92

Supreme Court, U.S.
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No. (1)

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In The Supreme Court of the United States

JOSEPH DEAN, et al.,

Appellants,

v.

LARRY LEAKE, et al.,

Appellees,

and

NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP,

Appellee-Intervenor.

On Appeal from the United States District Court
for the Eastern District of North Carolina
Northern Division

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether a jurisdiction's use of erroneous census data when it knew that more accurate enumerated census data was available meets the jurisdiction's obligation to make an honest and good faith effort to construct districts as nearly of equal population as practicable?

2. Whether the court below erred in using erroneous census data used by the jurisdiction in measuring whether the challenged plan had a maximum population deviation of 10% or higher?

PARTIES TO THE PROCEEDING

Appellants are Joseph Dean, Alfred Freimark, Homer Marshall, Jack Steer, Mikele Haywood, Kimberley Hendrix, Dena Barnes, Dwight Story, Robert Rucho, William (Frank) Mitchell, Mike Clampitt, Eric Weaver and Leon Bonner. Appellees are Larry Leake, in his; Genevieve C. Sims, Robert B. Cordle,; Lorraine G. Shinn,; and Charles Winfree, Gary Bartlett,; and Roy Cooper,. Appellee-Intervenor is North Carolina State Conference of Branches of the NAACP. All individual Appellees were sued in their official capacities.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

PARTIES TO THE PROCEEDING.....ii

TABLE OF AUTHORITIES.....vi

OPINIONS BELOW.....1

JURISDICTION..... 2

CONSITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE..... 3

THE QUESTIONS PRESENTED ARE SUBSTANTIAL..... 9

I. FAILURE TO DECIDE THIS ISSUE AT THIS TIME WILL RESULT IN CONTINUING, PERMANENT UNREMEDIBLE HARM TO APPEALLANTS AND OTHERS SIMILARLY SITUATED..... 9

II. THE GENERAL ASSEMBLY USED THE ERRONEOUS CENSUS DATA IN ORDER TO INTENTIONALLY INCREASE THE INFLUENCE OF VOTERS BASED ON WHERE THEY LIVED IN PARTICULAR THE VOTERS IN CHAPEL HILL.....12

TABLE OF CONTENTS—Continued

Page

III. THE DISTRICT COURT IS REQUIRED TO USE THE CORRECTED ENUMERATED CENSUS DATA AVAILABLE TO A JURISDICTION WHEN ASSESSING THE LEGISLATIVE REDISTRICTING SCHEME FOR COMPLIANCE WITH THE ONE PERSON, ONE VOTE PRINICIPLE 21

IV. THE APPLICATION OF THE CORRECTED CENSUS DATA TO THE CURRENT EDISTRICTING SCHEME PROVES A PRIMA FACIE CASE OF VOTE DILUTION AND THE STATE HAS NO CONSISTENTLY APPLIED LEGITIMATE STATE POLICY TO REBUT THE PRESUMPTION.....29

CONCLUSION.....34

APPENDIX A

Dean v. Leake, Memorandum Opinion ___F.Supp.___ (E.D., N.C., 2008).....App.1

APPENDIX B

Notice of Appeal.....App.27

APPENDIX C

State House Charts.....App.30

TABLE OF CONTENTS—Continued

Page

APPENDIX D
State Senate Charts.....App.45

APPENDIX E
Maps of Orange County Districts.....App.52

APPENDIX F
Declaration of Joel Raupe.....App.54

APPENDIX G
Department of Commerce Letters.....App.57

APPENDIX H
Oct. 3, 2008 Dept. of Commerce
Letter.....App.61

TABLE OF AUTHORITIES

CASES Page

Baker vs. Carr, 369 U.S.186(1962).....29

Brown v. Thomson, 462 U.S. 835, 842 (1983).....31

Bush v. Gore, 531 U.S. 98 (2000).....15

Connor v. Finch, 431 U.S. 407, 418 (1977).....31

Daggett v. Kimmelman, 580 F.Supp 1259
(D.C.N.J,1984).....23

Dept. of Commerce vs. House of Representatives,
525 U.S. 316 (1999).....24

Elrod v. Burns, 427 U.S. 347,(1976).....10

Franklin [v Massachusetts, 505 U.S. 788 (1992)].....26

Gaffney v. Cummings, 412 U.S. 735, 745 (1973).....30

Gutierrez v. Municipal Ct. of S.E. Judicial Dist.,
838 F.2d 1031, 1045 (9th Cir. 1988).....10

Karcher vs. Daggett, 462 U.S.725,(1983).....23, 24

Larios vs. Cox, 300 F.Supp.2d 1320 (ND Ga.)
Sum. aff'd 542 U.S. 947 (2004).....2, 13, 21

Mitchell v. Cuomo,748 F.2d 804, 806
(2nd Cir. 1984) 10

TABLE OF AUTHORITIES—Continued

CASES Page

National People's Action v. Village of Wilmette, 914 F.2d 1008, 1013 (7th Cir. 1990).....10

Pender County vs. Bartlett, 361 N.C. 91, 649 S.E.2d 36 (2007).....11

Planned Parenthood v. Citizens for Community Action, 558 F.2d 861, 867 (8th Cir. 1977).....10

Reynolds vs. Sims, 377 U.S. 533 (1964).....2, 14, 29

Roman v. Sincock, 377 U.S. 695,(1964).....31

United States vs.Black, 490 F.Supp. 630, (E.D.N.C., 2007).....16

Utah v Evans,356 U.S. 452 (2002).....25,26,29

White v. Regester, 412 U.S. 755, 764 (1973) 31

CONSTITUTIONAL AUTHORITY U.S. CONST., FOURTEENTH AMENDMENT.....
STATUTORY AUTHORITY 42 U.S.C. § 1983

IN THE

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On Appeal from the United States District Court for the Eastern District of North Carolina, Northern Division

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The three-judge District Court's opinion is not yet reported except in Westlaw 2008 WL 728543 and reprinted at pages App.1 to App.26 of the Appendix to this Jurisdictional Statement ("J.S. App.").

JURISDICTION

The District Court denied Appellants' claim for injunctive relief and entered judgment on March 17, 2008. J.S . App. A. Pursuant to 28 U.S.C. § 2101(b), Appellants filed timely notices of appeal on March 20, 2008. J.S. App. B. This Court's jurisdiction is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; ... nor deny to any person without its jurisdiction the equal protection of the laws." Appellants asserts that its associational rights and its rights to equal protection of the law have been violated by the adoption and enforcement of the challenged redistricting plan in that the plan violates the one person, one vote principle.

The statutory provision involved in this case is 42 U.S.C. § 1983. Appellants asserts that the challenged state legislative redistricting scheme infringes on their fundamental right to vote and the case law which holds that their votes should not be unfairly diluted by an election mechanism which discriminatorily weights some votes more than others in violation the one-person, one-vote principles of *Reynolds vs. Sims* 377 U.S. 533(1964), *Larios vs. Cox* 300 F.Supp. 1320 (N.D.Ga) Summ. Aff'd 542 U.S.947 (2004).

STATEMENT OF THE CASE

Appellants seek reversal of a preliminary injunction decision of a three-judge district court that effectively determined the outcome of Appellants claims by making an error of law regarding the proper standard for the court to use in assessing the overall range of population deviation a court should use to assess violations of one person, one vote. The three-judge district court made two key errors.

First, the District Court erroneously held that the jurisdiction's use of census data known by it to be mathematically erroneous instead of the corrected enumerated data which was available at the time of the enactment of jurisdiction's plan met the jurisdiction's obligation to make an honest and good faith effort to construct districts as nearly of equal population as practicable under *Reynolds* and its progeny.

Second, the District Court below erred in using this same erroneous census data used by the jurisdiction in measuring whether the challenged plan had a maximum population deviation of 10% or higher?

Factual History

A summary of most of the relevant facts and background information are set forth in the Opinion of the three judge District Court[1] however the facts

[1] A three judge district court was properly convened it was composed of Allyson K. Duncan, Circuit Judge, Louise W.

described below are particularly pertinent to this case.

After the completion of the 2000 Census the Census Bureau conducted a program to correct processing and tabulation errors that occurred when the original raw enumerated data was being tabulated into its published form. This program was called count question resolution or CQR. This program replaced the post census local review program which the Census Bureau had used after the 1980 and 1990 censuses.[2] The post census local review program produced the enumerated Census corrections which were used by this Court in the case of *Karcher v. Daggett*, 462 U.S. 725, 728 n.1 (1983) the count question resolution program uses only data collected in the original enumerated census, as did the post census local review program, and no additional data are collected.

Typically jurisdictions provide the Census Bureau with Census blocks which they believe to be in error and an explanation of what they believe the error to be. The Census Bureau may review certain results without a request by the jurisdiction if the Bureau believes that an error occurred in a

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Flanagan, Chief Judge for the Eastern District of North Carolina and Robert J. Conrad, Chief Judge for the Western District of North Carolina and currently nominated for the Fourth Circuit Court of Appeals but has not been confirmed.

[2] Count Question Resolution is essentially the same program as post census local review conducted slightly later in the decade. This is because of the attempt by the Census Bureau to use statistical adjustment instead of an enumerated census delayed the beginning of the program.

jurisdiction which did not request a review then the Bureau will notify that jurisdiction by letter. The majority of errors corrected by this process are what are known as "geocoding" errors, that is the total population is correct but it has been placed in the wrong census block. However occasionally either by tabulation error or by improperly including or excluding a census form, the Bureau over or undercounts a census block or blocks and as a result an entire jurisdiction. As a result of the Bureau's investigation into these errors it has to examine the raw census data for individual households and as a result is inevitably aware of all of the errors for all census characteristics on a block by block basis.

All corrections as a result of the count question resolution program were supposed to be sent to the affected jurisdictions by September 30, 2003. If the Bureau made a correction because of the request of the jurisdiction the Bureau would provide a block level correction showing the population and housing count for each block. If however the correction was as a result of the Bureau's own investigation the Bureau would only provide jurisdiction level data down to the smallest jurisdiction affected unless an affected jurisdiction requested block level data. These corrections would show the corrected total population and housing counts for the affected jurisdictions.

By late October, 2003, the North Carolina General Assembly received from the Census Bureau information that the census data, previously provided, regarding the number of persons in various localities throughout the State was in error;

the Census Bureau provided the General Assembly staff responsible for the production of the redistricting maps the corrected figures for the population data.[3]

While this data was available to the state of North Carolina it was not available to the general public and the Census Bureau would not make it available to the general public until June of 2004. The data made available to the public in June reports the corrections at the block level. On March 21, 2000, the Census Bureau released the erroneous population data showing that North Carolina had a population of 8,049,313. On May 1, 2001, the North Carolina General Assembly legislative services office released a Legislator's Guide for redistricting. Under this guide, legislators were advised that the average number of persons each Senator will represent was 160,986 (8,049,313 ÷ 50); and that each Representative will represent an average of 67,078 (8,049,313 ÷ 120).

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[3] The state North Carolina in its initial filing before the District Court indicated that it had not received this information prior to revealing the redistricting scheme during a special legislative session called for that purpose, however at the hearing before the court the state admitted that the legislative staff had received all of the correction letters from the Census Bureau prior to the special session except those concerning 5 counties. These five counties are Craven which increased its total population by 87 people; Edgecomb which had no population changes; Johnston which had a 65 person decrease in total population; Nash which had a 35 person decrease in total population; and Pitt which had a 79 person decrease in total population. The letters received by the staff included the Chapel Hill/Orange County corrections.

The ideal district size for state house districts using the corrected data is 67,054. (8,046,485 / 120) The ideal district size for Senate districts using the corrected data is 160,930. (8,046,485 / 50)[4] Although many of the corrections to the census data are small, an error in the town of Chapel Hill in Orange County was statistically and legally significant because the Census Bureau had over counted 2,696 persons. The state of North Carolina's overall population loss was 2828 people only 132 people more than the loss in the town of Chapel Hill in Orange County alone. Furthermore the Legislature had unnecessarily placed many of the districts near the edge of the 10 percent range of deviation which meant the alteration in ideal district size caused several districts to no longer be in compliance.

This over count, when used in calculating the equal population of election districts caused Orange County to be grouped differently under the North Carolina anti-gerrymandering criteria and caused District 56 in the House and District 23 in the Senate to be under-populated. Notwithstanding receipt of this new information, in November, 2003, the General Assembly adopted redistricting legislation, SL 2003-434, establishing new districts for the State Senate ("2003 State Senate Plan"), and a redistricting scheme for the House ("2003 State House Plan") using census data known to certain members and their staff to be erroneous in that it over counted population in Orange County.

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[4] The complete corrected Census 2000 enumerated block level data for North Carolina is found at http://www.census.gov/prod/cen2000/notes/blks-37.xls.

Moreover, this corrected data was not made generally available to members of the General Assembly outside of the leadership, nor was the public made aware by the General Assembly's leadership that it had in fact received the corrected data.

Using the corrected census data, the smallest House district is District 56 in Chapel hill/Orange County with a total population of 61,127 and a deviation from ideal of -8.84%. Using the corrected census data, the largest House district is District 6 in Beaufort and Pitt Counties with a total population of 70,689 and a deviation from ideal of +5.42%.[5] The overall range of deviation in the House of Representative is 14.26%. This is well in excess of the 10% deviation allowed for state legislative plans without justification by a legitimate consistently applied state policy by either the U.S. or N.C. Constitutions. Other districts which are under represented in excess of the 10% overall range are listed in Appendix C. Over two fifths of the House of Representatives districts are overpopulated in excess of the 10 percent overall range.

Using the corrected census data, the smallest Senate district is District 23 in Orange and Person Counties with a total population of 151,154 and a deviation from ideal of -6.07%. Using the corrected

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[5] Pitt County is one of the 5 counties which the state North Carolina asserts it did not receive from the Census Bureau prior to the special session. Accepting the state's assertion as true the most overpopulated district would be House District 35 with a total population of 70,471 and a deviation from the ideal of +5.10%. The overall range of deviation in the House of Representatives then would be 13.94%.

census data, the largest Senate district is District 17 in Wake County with a total population of 169,010 and a deviation from ideal of +5.02%. The overall range of deviation is 11.09%. Other Senate districts which are overpopulated in excess of the 10% overall range include, 21, 39, 19, 42, 10, 18, 33, 26, 8. This constitutes one fifth of the Senate. Other Senate districts which are under represented in excess of the 10% overall range include listed in Appendix D.

As noted by the District Court the people of North Carolina through their constitution have attempted to address the legislature's historical gerrymandering by eliminating the Legislature's discretion and requiring that legislative districts are drawn according to a formula to the greatest extent possible. This is accomplished by requiring individual counties to be placed into groups based upon their population. Because all the county groups fit together like a puzzle any change in the county groupings, such as the changes dictated by the use of the corrected enumerated census data, can have a large ripple effect on a plan. Likewise if County populations are close to the population which will cause a change in the county groupings even small population changes can have a dramatic effect on the redistricting scheme.

THE QUESTIONS ARE SUBSTANTIAL

I. FAILURE TO DECIDE THIS ISSUE AT THIS TIME WILL RESULT IN CONTINUING, PERMANENT UNREMEDIBLE HARM TO APPEALLANTS AND OTHERS SIMILARLY SITUATED

The preliminary injunction opinion of the court below applies an erroneous standard of federal law, in that a court measuring an equal protection violation should not use the most accurate enumerated census data available to the drafter of the redistricting scheme at the time of its enactment. Without appellate intervention by this court, it is unlikely that the appellants will persuade the court that the legal standard it has applied is in error. This error of law effectively decides the case.

Because the right to cast an equally weighted vote is protective of all other rights, deprivation of this right is irreparable. The violation of a fundamental constitutional right is irreparable harm *per se*. *Elrod v. Burns*, 427 U.S. 347, (1976). *National People's Action v. Village of Wilmette*, 914 F.2d 1008, 1013 (7th Cir. 1990), *citing* Wright & Miller, cert. denied 499 U.S. 921, (1991). *Gutierrez v. Municipal Ct. of S.E. Judicial Dist.* , 838 F.2d 1031, 1045 (9th Cir. 1988), *Mitchell v. Cuomo*,748 F.2d 804, 806 (2nd Cir. 1984), *Planned Parenthood v. Citizens for Community Action*,558 F.2d 861, 867 (8th Cir. 1977), all citing Wright & Miller.

Traditional adjudication would be unlikely to correct this error for several years. In the interim the voters of North Carolina would continue to be deprived of equal protection under either the federal or state constitutions. As was alluded to in the court opinion below, there has been a decade of state litigation in which the legislature has been involved in enacting and conducting elections repeatedly under unconstitutional schemes (footnotes 3, 4, 5,

slip opinion Appendix A). The historical record of non-compliance with both federal and state law during this decade shows that no election since 2000 was conducted under a plan which meets both federal and state constitutional criteria and merely acts to enhance the irreparable harm which continues to linger.

The issue upon which review is sought is purely a matter of law. Traditional adjudication could result in this error of law not being corrected or applied until well after the 2010 elections, when the issue would become moot because a new statute would be drafted following the completion of the 2010 census. Should the court determine the legal issue, then the parties would be benefited by having an early decision which could be implemented in the 2009 legislative term in time to provide an effective remedy.

A clarification of the legal issue would effectively end the litigation in one of two results. A summary reversal would result in having districts redrawn according to equal protection principles throughout the state. An affirmance would practically end the litigation, since the District Court's error of law precludes the ability to state a one person, one vote claim. If this court affirms a companion case it is currently considering, *Bartlett vs. Strickland* (07-689), the North Carolina Legislature will have to redraw its legislative maps to comply with the remedy previously ordered in *Pender County vs. Bartlett* 361 N.C. 491, 649 S.E.2d 364 (N.C., 2007) by the Supreme Court of North Carolina. If this court affirms the preliminary

injunction opinion of the lower court, then the North Carolina Legislature will again use the erroneous census data in the 2009 redistricting. In any event both parties and the public would be benefited by the earliest resolution of this issue.

II. THE GENERAL ASSEMBLY USED THE ERRONEOUS CENSUS DATA IN ORDER TO INTENTIONALLY INCREASE THE INFLUENCE OF VOTERS BASED ON WHERE THEY LIVED IN PARTICULAR THE VOTERS IN CHAPEL HILL.

As this Court has recognized, "no right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Wesberry vs. Sanders*, 376 U.S. 1, 17 (1964). The General assembly of North Carolina has been the "poster child" for bad redistricting behavior in the last four decades if not much earlier in history. The General Assembly of North Carolina has continued this tradition by refusing to enact a legal and constitutional redistricting plan for the General Assembly since the 2000 election. As a result elections for the General Assembly in North Carolina have taken place in 2002, 2004 and 2006 under illegal election districts in most of the state and the maps as in the last decade have remained in perpetual litigation. If plaintiffs are not granted relief the result will be that the General Assembly will be rewarded for its intentional delaying tactics by having 80 percent of

the legislative elections conducted in this redistricting cycle under illegal redistricting schemes and if their past conduct is a predictor of their future conduct then we can rest assured that they will take any delay as an opportunity to conduct the 2010 elections under an illegal districting scheme is well.

As the most recent decision regarding this area of the law stated "forty years of Supreme Court jurisprudence have established that the creation of deviations for the purpose of allowing the people of certain geographic regions of a state to hold legislative power to a degree disproportionate to their population is plainly unconstitutional." *Larios v. Cox*, 300 F. Supp. 2d 1320 (2006) *sum. Aff'd.* 542 U.S. 947 (2004) The *Larios* Court continued "Discrimination against certain voters based on the fortuity of where in the state they live cannot be reconciled with the command of *Reynolds:* '[t]he fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote.... [T]he basic principle of representative government remains, and must remain, unchanged-the weight of a citizen's vote cannot be made to depend on where he lives.... A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of "government of the people, by the people, [and] for the people." The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as

of all races.'" *Id* at 1342 citing *Reynolds v. Sims*, at 377 U.S. at 567-68.

The *Reynolds* Court cited above held that "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." *Reynolds* at 568,. "[A]ll voters, as citizens of a State, stand in the same relation regardless of where they live. Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purposes of legislative reapportionment.... **Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status.**" *Id* at 565-66 (emphasis added).

In this case voters in Orange County, as well as other intentionally under populated districts, as indicated in Appendix E, were intentionally favored in order to further the political needs of specific incumbents, including the former Majority Leader who is now the Speaker, in the North Carolina General Assembly. As a result of this intentional under population of Orange County districts in both the North Carolina House and Senate voters elsewhere in the state were intentionally discriminated against by having their votes diluted because their districts were overpopulated and hence underrepresented as a result of this intentional use

of the erroneous census reports and a refusal to use or reveal the corrected census data. As a result of this intentional discrimination over one fifth of North Carolina citizens live in overpopulated and hence underrepresented Senate districts in excess of the 10 percent range which this Court has found to establish a prima facie case of a violation of the equal protection clause of the Fourteenth Amendment based on the principle of one person one-vote. Likewise over two fifths of North Carolina citizens are similarly underrepresented in overpopulated North Carolina House of Representatives districts. This discrimination is even greater in North Carolina because of the effect that using the erroneous census data, as opposed to the corrected census data which was available at the time that the North Carolina General Assembly constructed its redistricting scheme in 2003, has on how the counties are grouped according to the North Carolina anti-gerrymandering criteria. As a direct result of this intentional use of erroneous census data a majority of the state's voters are in illegal election districts under either state or federal law. This both violates the anti-gerrymandering policy behind the state criteria as well as causing numerous voters to be placed in illegally constituted districts when other voters in the state have been able to vote in the last two election cycles in legal districts violating the equal protection and due process clause of the Fourteenth Amendment. (See *Bush v. Gore*, 531 U.S. 98 (2000) The Constitution does not create a right vote for President or for electors for President, [or in this case districts that comply with the state's gerrymandering provisions] that is a state created right but once given the

Fourteenth Amendment does require that such a right comply with equal protection and due process.) Over three-quarters of the state's voters are in illegal Senate districts if the corrected census data is applied to the *North Carolina anti-gerrymandering* criteria. Nearly three-quarters of the state's voters are in illegal House of Representatives districts if the corrected census data is applied to the *North Carolina anti-gerrymandering* criteria.

In 2003 Democratic Speaker Black engaged in bribery of one or more of the then Republican legislators *U.S. v. Black,* 490 F.Supp.630 (E.D.N.C., 2007)] in order to retain control of the North Carolina House of Representatives one of the principal reasons why he took such drastic steps was so that he could enact the redistricting scheme which is the subject of this litigation. A grand jury is still investigating the full extent of the bribery scandal. A small number of Republicans in an addition to Rep. Decker joined with Speaker Black in order to allow the Democrats to retain control of the North Carolina House of Representatives, principal among these was former Rep. Richard Morgan who was named co-speaker[6].

Of all the corrections made to the Census Bureau as part of the Count Question Resolution program (CQR) the most significant is the 2696 person over count in Orange County. North Carolina's Census 2000 total population was reduced by 2828 people as a result of the CQR program. The

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[6] Rep. Morgan was subsequently defeated in a Republican primary.

state's overall population loss is only 132 people than the population loss in Orange County alone. Unlike other jurisdictions the Census Bureau did not provide block level data to the legislative staff for the Orange County over count. This however should not have prevented the legislative staff and legislative leadership from incorporating this correction into the subsequent redistricting. Block level data is important in redistricting because when a larger unit of geography, such as a county or city is divided the block level data is necessary in order to get an accurate count of the district population. However if the larger unit of geography which wholly contains the correction is in turn wholly contained within the district then the block level data is unnecessary in order to accurately correct the district because you know the district in which the entire error is located. The error in the Orange County Census count is wholly contained within the Town of Chapel Hill contained in Orange County (the error appears to be wholly contained on the campus of the University of North Carolina). Chapel Hill had a population of 48,715 under the erroneous census count and a population of 46,019 under the corrected census count. The ideal district population under the corrected census count is 67,054 people for a House of Representatives district and 160,930 for a Senate district. If that portion of the Town of Chapel Hill which is located in Orange County is wholly incorporated into a single House district and a single Senate district the block level data is unnecessary in order to correct the district's population. You simply subtract it from the totals for those two districts.

In the actual redistricting scheme enacted by the North Carolina Legislature Orange County and the Town of Chapel Hill were wholly contained within Senate District 23. At the time this district was drawn the legislative staff and the legislative leadership knew or should have known that this district had been over counted by exactly 2696 people. The corrected enumerated census total population for the town of Chapel Hill is approximately two-thirds of the total population of an ideal house district and therefore could be easily wholly incorporated into a single house district eliminating any need for block level data. In the actual House redistricting scheme, the University of North Carolina campus which is where the error occurred, is wholly contained in House District 56, over 90% of the Town of Chapel Hill is also contained in the District. This means that the legislative leadership would have been virtually certain that the entire Chapel Hill Census error was wholly contained in District 56 and indeed the error is wholly contained within that district.. Then as if to add insult to injury the legislative line drawers proceeded to under populate House District 56 by an additional 3231 people. The amount that the Legislature intentionally under populated House District 56 plus the amount of the over count is over two times greater than the population of the town of Chapel Hill that was not included in District 56 as drawn in the legislature's 2003 redistricting scheme. In fact the population of Chapel Hill not included in House District 56 is smaller than the census error. Including the remainder of the town of Chapel Hill into House District 56 would have corrected the census enumeration error and resulted in nearly the

ideal district population and more closely adhered to North Carolina's anti-gerrymandering criteria. Clearly having the block level data in Orange County was not necessary in order to use the corrected Census 2000 enumerated population to create a fair redistricting plan that complied with one person one vote and the North Carolina anti-gerrymandering criteria.

A reduction of more than 1000 people in the population of Orange County was sufficient to alter the county groupings required by the North Carolina Constitution in both the House of Representatives and Senate redistricting schemes. When informed of a census error of nearly three times that scale the legislative staff and legislative leadership knew or should have known that because of the Orange County error the county groupings required by the North Carolina Constitution's anti-gerrymandering criteria were also in error requiring a completely different set of county groupings from those embodied in the Senate and House redistricting schemes. These changes are described in Plaintiffs complaint and initial memorandum in support of the motion for Preliminary injunction.

Furthermore while the legislative staff was clearly made aware of this error by the Census Bureau the principal opponent of the legislative leadership on redistricting, the Senate Minority Leader, Patrick Ballantine was not provided this information. (See Appendix F) The highest-ranking Republican in the House of Representatives was co-speaker Morgan who was in alliance with Speaker Black at the time and as a result was estranged from

his own caucus. The only rational explanation for the legislative staff and leadership to hide this information would be to benefit members of the legislative leadership in the redistricting process.

An examination of the four districts concocted in the four County grouping that included Orange County in the legislature's 2003 redistricting scheme illustrates this point. In the 2003 redistricting scheme Caswell, Orange, Chatham and Moore counties are placed in a single county grouping containing 4 House of Representatives districts. The Orange County electorate is intensely Democrat in its voting behavior. Moore County is heavily Republican. Chatham is more of a tossup Three Democrat incumbents reside in Orange County, including the Democrat Majority Leader, the fourth incumbent in the grouping was co-speaker Morgan who resided in Moore County. When the districts were concocted Morgan's District 52, which was at the far southern end of the county grouping was overpopulated by 3153 people or 4.71 percent above the ideal district size. District 50 which was at the far northern end of the County grouping was under populated by 2580 people. District 56 which was previously discussed above contained a census population error and it was further under populated by over 3000 people which resulted in a total under population of over 5900 people.

The Democrat majority leader's district is composed of part of Orange County, all of Chatham County and part of Moore County. The Majority Leader's district was less than 200 people over ideal population. By manipulating the census error and

the population deviations in these districts the Majority Leader was able to shed a 3100 person area composed predominantly of Republican voters and receive an infusion of highly motivated Democrat voters in Orange County from the nearly 6000 people he gained in Orange County. This manipulation would not have possible with out the census data error. Furthermore if the census error had been corrected the North Carolina anti- gerrymandering criteria would have required all three Orange County Democrat incumbents to be placed in a two county grouping composed of Orange and Caswell counties but containing only two House of Representatives Districts. One of the three Democrats from Orange County, possibly including the current speaker would necessarily have been eliminated from the House of Representatives. This is exactly the type of intentional manipulation of deviations for partisan purposes which are forbidden by *Larios vs. Cox,* 300 F.Supp.2d 1320 (ND Ga.) Sum. aff'd 542 U.S. 947 (2004).

III. THE DISTRICT COURT IS REQUIRED TO USE THE CORRECTED ENUMERATED CENSUS DATA AVAILABLE TO A JURISDICTION WHEN ASSESSING THE LEGISLATIVE REDISTRICTING SCHEME FOR COMPLIANCE WITH THE ONE PERSON, ONE VOTE PRINCIPLE.

The District Court correctly recognized that Plaintiffs/Appellant's would suffer immediate, permanent, irreparable and continuing harm if Defendants were allowed to conduct elections under an unconstitutional redistricting scheme. The

District Court also correctly understood that if the General Assembly's redistricting had an overall range of deviation in excess of 10 percent the deviation must be justified by a legitimate consistently applied rational state policy. As a result the District Court proceeded directly to the issue of whether plaintiffs/appellants could succeed on the merits of their one person one-vote cause of action. The District Court makes its crucial legal error when it reduces its entire legal analysis down to the question of whether the state North Carolina had a legal duty to use the corrected enumerated census data as opposed to the erroneous enumerated census data. *Dean vs. Leake*, 2008 WL 728543, 7. The court essentially says the state of North Carolina has no duty to use corrected enumerated census data instead of erroneous enumerated census data. The court then proceeds to hold that if the state is not required to use the corrected enumerated census data and chooses to use the erroneous data then the court cannot assess the state's compliance with the Fourteenth Amendment's one person one-vote requirement using the corrected enumerated census data but must instead make that analysis using the erroneous census data used by the General Assembly. **As the District Court said its opinion "in the absence of a duty to use the corrected census data, Plaintiffs cannot show a violation of the one person, one-vote requirement."** *Dean* at 8 (emphasis added). By using this analysis the District Court has not only foreclosed Appellants from being able to prove their first cause of action in this case but has also allowed the General Assembly of North Carolina to again use the erroneous census data to construct another redistricting scheme if this

court affirms the North Carolina Supreme Court in *Strickland vs. Bartlett* , *Id.* and the state of North Carolina and is required to create another legislative redistricting scheme. This error of law by the District Court misreads both the letter and spirit of this Court's prior precedents.

In *Karcher vs. Daggett*, 462 U.S. 725, 728 n.1 (1983) this Court assessed New Jersey's congressional redistricting plan based upon the corrected enumerated census data which the state had notice of at that time. The Census Bureau's postcensus local review program, the Census Bureau's predecessor to CQR, released two corrections to the enumerated census data. The first of these corrections increased the total population of the city of East Orange by 665 people.[7] The second correction increased the total population of the city of East Orange by an additional 188 people. This Court correctly used the most accurate enumerated census data available to the jurisdiction at the time that it constructed its redistricting scheme to determine if the redistricting scheme violated the one-person one-vote principle.[8] The District Court

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[7] This correction also included a geocoding error between Evansham and Medford townships in Burlington County.

[8] Furthermore, in *Daggett vs. Kimmelman*, 580 F.Supp. 1259 (D.C.N.J. 1984) which is the *Karcher* case on remand, the District Court required that all plans submitted to the court include the second census correction which was not used when the Supreme Court invalidated the New Jersey redistricting scheme. The state North Carolina may now find itself in the same position as New Jersey was in 1984. The legislative redistricting map has been invalidated by the North Carolina Supreme Court in *Strickland vs. Bartlett*, if this court affirms that decision then this case will

distinguishes the *Karcher* case by stating that this court uses "permissive not mandatory language when referring to the use of corrected census data." *Dean* at 8. the District Court goes on to say "that states conducting redistricting years after the decennial census are operating under a legal fiction." *Id.* This statement by the District Court totally ignores the reason why the so-called legal fiction exists. The decennial census data is the last most accurate depiction of enumerated census data. All other population data is either a statistical adjustment, projection or estimation. Only enumerated census data is usable for apportionment, and has the integrity as well as geographic accuracy necessary for redistricting. *Department of Commerce vs. House of Representatives*, 525 U.S. 315 (1999) see also Scalia concurring at 346. As a result this data remains in use until is replaced by more accurate enumerated census data. The fiction is that enumerated census data maintains the level of accuracy that it had at the time it was initially released however it continues in use because it is still the most accurate enumerated census data. In this case as in the *Karcher* case the corrected data is the last statement of the most accurate enumerated data available to the jurisdiction and therefore should be used by the federal courts to assess redistricting schemes created after the release of the corrected data for their compliance with the one person one-vote mandate of the Fourteenth

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determine which census data will be used to assess one person, one-vote when the map is redrawn.

Amendment irrespective of which data was used by the Legislature.

On June 20, 2002 this Court, in *Utah vs. Evans*, 536 U.S. 452, 462 (2002) addressed a similar issue regarding corrections to the enumerated census results. In that case this Court told the state of North Carolina that if substantial errors, of the type involved in this case, were discovered in the original census and subsequently corrected then the court had the authority to issue appropriate orders based on the corrected census data. In *Evans,* North Carolina, through its Attorney General's office, intervened as a defendant in Utah's challenge to the use of so-called "hot deck imputation" in the 2000 Census. North Carolina's principal argument in this case was that the Census statute essentially prevented any change in the numbers used for reapportionment after their original publication. Seven Justices of this court concurred in the court's decision by Justice Beyer which forcefully disagreed. As the Court stated:

"**We disagree with North Carolina** because we do not read these statutes so absolutely-as if they barred a certificate's revision in all cases no matter what. The statutes themselves do not expressly say what is to occur should the "report" or the "statement" upon which the Clerk's "certificate" rests turn out to contain, or to reflect, a serious mistake. The language is open to a more flexible reading **that would permit correction of a certificate found to rest upon a serious error-say, a clerical, a mathematical, or a calculation error, in census data or in its transposition. And if that error**

is uncovered before new Representatives are actually selected, and its correction translates mechanically into a new apportionment of Representatives without further need for exercise of policy judgment, such mechanical revision makes good sense. In such cases, the "certificate" previously sent would have turned out not to have been a proper or valid certificate, it being understood that these statutes do not bar the substitution of a newer, more accurate version. Guided by *Franklin* [*v Massachusetts,* 505 U.S. 788 (1992)] which found standing despite the presence of this statute, we read the statute as permitting "certificate" revision in such cases of error, and we include among them cases of **court-determined legal error leading to a court-required revision of the underlying Secretarial "report**." So read, the statute poses no legal bar to 'redress.'" *Utah vs. Evans*, 536 U.S. 452, 462 (2002) (emphasis added).

The letters from the Census Bureau conclusively prove that the type of errors corrected in North Carolina in Orange County and elsewhere are exactly the types of errors described by the Court in *Utah vs. Evans*. The letter to the Chairman of the Orange County Commission states that: "[o]ur research found an **error** in the geographic assignment of group quarters in various blocks within the Town of Chapel Hill. In addition, we identified housing units that were **erroneously** included in Census 2000 **due to processing errors.**" Appendix G (emphasis added). It is important to remember that these are errors not in the collection of the census data in 2000 but are

instead errors in adding up that data. These corrected data are not based on any statistical adjustment, estimation or projection but are instead the actual enumerated data properly summed. When the Census Bureau sent the actual corrections on September 30, 2003 they noted: "according to the **official returns** of the TWENTY-SECOND DECENNIAL CENSUS OF THE UNITED STATES, on file in the U.S. Census Bureau, **the count as of April 1, 2000**, for Orange County, North Carolina, are [the corrected population count]" Appendix H (capitalization in original, emphasis added).

In this case the Census Bureau has corrected errors, exactly like those described above, so as to produce a more "accurate version" of the original census 2000 results prior to the enactment of a the redistricting scheme but the District Court ignores the "good sense" this court referred to in *Evans* and similarly ignores the corrected enumerated census data for any determination as to whether such a redistricting scheme would actually comply with the one-person, one-vote principle of the Fourteenth Amendment.

As well as providing this data to the local jurisdictions, as indicated by the Census Bureau's letter of February 20, 2003 this information was also contemporaneously provided to those members of the legislative staff responsible for redistricting data, Mr. Terrence Sullivan, Mr. Bill Gilkeson, Mr. Dan Frey, and Mr. Gerry Cohen. Appendix H. The letter notes that the staff responsible for redistricting data will receive corrections for the block level census data.

The letters clearly indicate that the legislative staff responsible for redistricting data was made aware of the errors in Orange County, as well as other locations in the state, on or about the second week of May 2003, almost exactly six months prior to the enactment of the current legislative redistricting scheme. The letters also indicate that on or about September 30, 2003 the legislative staff responsible for redistricting data were made aware of the numerical values of the errors which had occurred in Orange County and were at that time capable of correcting the population data in North Carolina's redistricting database so as to accurately reflect the correct enumerated Census 2000 population. The legislative staff did not incorporate the corrections to the Census 2000 results which they had received into the population data in North Carolina's redistricting database nor did they inform any of the legislative opponents of the legislative leaderships' redistricting scheme that they in fact were in possession of corrected block level data from the Census Bureau. By hiding the fact that they possessed the block level data they effectively prevented any of the legislative opponents from using the corrected census data to draw redistricting plans which properly grouped counties according to North Carolina's anti-gerrymandering provisions and complied with the one-person one-vote requirements of the Fourteenth Amendment. The only plausible explanation for this conduct is that the legislative leadership, Speaker Black and his allies, were aware that the use of the corrected census data would require that an incumbent Democrat representative from Orange County necessarily be paired with the House of

Representatives Democratic Party Majority Leader, as well as other incumbent pairings, and that the legislative leadership, with the complicity and assistance of the legislative staff, intentionally sought to conceal the existence of the data until the legislative redistricting scheme could be enacted by the Legislature.

Clearly when the legislative redistricting scheme was enacted in November 2003 the legislative leadership, through its legislative redistricting staff, was in possession of "corrected" census data of the type described in the United States Supreme Court decision of *Utah vs. Evans.* Clearly possessing such data and refusing to use it in order to equalize the population cannot constitute an honest and good faith attempt to equalize the population of legislative districts to the extent practicable. *Reynolds vs. Sims*, 377 U.S. 533, 577 (1964)

IV. THE APPLICATION OF THE CORRECTED CENSUS DATA TO THE CURRENT REDISTRICTING SCHEME PROVES A PRIMA FACIE CASE OF VOTE DILUTION AND THE STATE HAS NO CONSISTENTLY APPLIED LEGITIMATE STATE POLICY TO REBUT THE PRESUMPTION.

The district court's refusal to use the corrected enumerated census data in order to assess one-person, one-vote under the fourteenth amendment violates the spirit and policy of 45 years of this court's precedent since *Baker vs. Carr.* The District Court in quoting *Reynolds vs. Sims*, places an

inappropriate 'only' in front of the quote "that a state make an honest and good faith effort to construct districts...as nearly of equal population as is practicable", when the word actually before the that is 'requires.' The 'only' turns a command into a limitation. There is no 'only' anywhere in that paragraph in *Reynolds*. At 577. This of course begs the question as to how using census data which you know to be erroneous can constitute an honest and good-faith effort to construct districts as nearly equal population as is practicable when you have more accurate corrected enumerated census data available. The District Court repeats this error when it states that the "Fourteenth Amendment's equal protection clause has been interpreted **only** to prohibit substantial population deviations among districts. That is, states have more flexibility in formulating redistricting plans for the state legislative seats by requiring **only** substantial population equality as opposed to strict population equality required in congressional redistricting plans." *Dean* at 7.(emphasis added) This of course ignores the fact of this Court has defined any overall range of deviation above 10 percent to be substantial.

In reviewing one person, one vote challenges to state legislative plans, this Court has adopted a so-called "ten percent rule" for allocating the burden of proof. In *Gaffney*, the Supreme Court observed that "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." *Gaffney v.*

Cummings, 412 U.S. 735, 745 (1973). After a series of cases further distinguishing minor population deviations from larger deviations requiring justification, *see Connor v. Finch,* 431 U.S. 407, 418 (1977); *White v. Regester,* 412 U.S. 755, 764 (1973), the Court eventually stated in more precise terms that, as a general matter, "an apportionment plan with a maximum population deviation under *10%* falls within this category of minor deviations" that are insufficient to make out a prima facie case of discrimination in violation of the Fourteenth Amendment. *Brown v. Thomson,* 462 U.S. 835, 842 (1983). In contrast, a plan with a higher maximum deviation "**creates a prima facie case of discrimination and therefore must be justified by the State.**" *Id.* at 842-43, 103 S.Ct. at 2696 (emphasis added). In considering legitimate justifications, courts must consider "[t]he consistency of application and the neutrality of effect of the nonpopulation criteria" in order to determine whether a state legislative reapportionment plan violates the Fourteenth Amendment. *Id.* at 845-46. Furthermore the burden of proof would be on the Defendants to prove that the redistricting process and the resulting deviations did not have a "taint of arbitrariness or discrimination." *Roman v. Sincock,* 377 U.S. 695, 710 (1964). The general policy of this court's decisions during the past 45 years regarding one person, one-vote has been that a jurisdiction should attempt to equalize its population using the most accurate enumerated census data available. The decision of the District Court in this case reverses that entire policy and replaces it with the idea that the initial report of the decennial census constitutes a safe harbor upon which any jurisdiction

can rely irrespective of the grossest mathematical or processing errors, even when those errors have been revealed and the Census Bureau has corrected them. This is the exact concept that this Court rejected in an analogous context in *Evans*. The same commonsense approach that this court used in *Evans* should also apply in this case and require the district court to assess the overall range of deviation using the corrected enumerated census data.

The ideal district size for House of Representative districts using the corrected data is 67,054. Using the corrected census data, the smallest House district is District 56 in Orange County with a total population of 61,127 and deviation from ideal of -8.84%. Using the corrected census data, the largest House district is District 6 in Beaufort and Pitt Counties with a total population of 70,689 and a deviation from ideal of +5.42%. This yields an overall range of deviation in the House of Representative of 14.36%. This is well in excess of the 10% deviation necessary to prove a prima facie case on the deviations alone. There are 48 other districts in excess of the 10 percent range. There are two more districts, 2 and 87, which are under populated in excess of -5%. Districts which are under represented in excess of the 10% overall range are listed in Appendix C. Over two fifths of the House of Representatives districts are overpopulated in excess of the 10 percent overall range and therefore the voters in these districts are unconstitutionally underrepresented.

The ideal district size for Senate districts using the corrected data is 160,929. Using the

corrected census data, the smallest Senate district is District 56 in Orange County with a total population of 151,154 and deviation from ideal of -6.07%. Using the corrected census data, the largest Senate district is District 17 in Wake County with a total population of 169,010 and a deviation from ideal of +5.02%. All voters in District 17 are under-represented and their voting strength is unconstitutionally diluted. The overall range of deviation is 11.09%. This is well in excess of the 10% deviation necessary to prove a prima facie case on the deviations alone. Other Senate districts which are under represented in excess of the 10% overall range include, 21, 39, 19, 42, 10, 18, 33, 26, 8, 17. Over 1/5 of the districts in the Senate are overpopulated in excess of the 10 percent overall range. The voters in these districts are under-represented and have had their votes unconstitutionally diluted. Two other districts, 3 and 14, are under populated in excess of -5%. See Appendix D.

Application of the principle annunciated in *Utah vs. Evans* to the corrections of the errors in the processing of the Census 2000 data requires that the corrected data produced by the Census Bureau in 2003 be used by this court to assess the compliance of North Carolina's 2003 legislative redistricting scheme with the one person one-vote principle of the equal protection clause of the Fourteenth Amendment. When the corrected census data is applied to the districts contained in North Carolina's 2003 legislative districting scheme overall ranges of deviations are produced which are sufficient to state a prima facie case for the Plaintiffs without any additional evidence. Since a prima facie case has

been stated the Plaintiffs are certain of success on the merits unless the Defendants can produce a consistently applied legitimate state policy for the use of the erroneous census data. It is extremely doubtful the Defendants can produce a consistently applied legitimate state policy for the use of the erroneous census data. In fact the Appellees have never suggested that they have or could ever produce such a policy they have relied instead on their assertion that the law allows them to rely on the erroneous census data irrespective of any subsequent corrections to that data. If the principle of *Evans vs. Utah* is applied in this context then the state North Carolina cannot be said to have made an honest and good faith effort to equalize population and can avail itself to no consistently applied legitimate state policy which is capable of rebutting the prima facie case in favor of Plaintiffs that is made by the overall range of deviation of the House and Senate redistricting schemes. There are no applicable disputable facts as to these issues the only question is one of law.

CONCLUSION

The appellants respectfully ask that this Court reverse and vacate the decision below and remand for a determination of exactly what corrected enumerated census data was available to the state North Carolina at the time it redistricted its General Assembly districts and that the District Court should use the most accurate enumerated census data available to the state North Carolina at that time when assessing the overall range of the legislative redistricting scheme for its compliance

with the one person one-vote principle.

Respectfully submitted,

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Dated: October 21, 2004

No. _____

In The Supreme Court of the United States

JOSEPH DEAN, et al.,

Appellants,

v.

LARRY LEAKE, et al.,

Appellees,

and

NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP,

Appellee-Intervenor.

On Appeal from the United States District Court
for the Eastern District of North Carolina
Northern Division

APPENDIX

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APPENDIX A

Larry **LEAKE**, in his official capacity as Chairman of the North Carolina State Board of Elections, et al., Defendants.
No. 2:07-CV-00051-FL-AD-RC.

March 17, 2008.

Robert Neal Hunter, Jr., Hunter Higgins Miles Elam & Benjamin, PLLC, Greensboro, NC, for Plaintiffs. Alexander McClure, Susan Kelly Nichols, Tiare Bowe Smiley, N.C. Department of Justice, Raleigh, NC, for Defendants.

Before ALLYSON K. DUNCAN, United States Circuit Judge, Fourth Circuit; ROBERT J. CONRAD, JR., Chief United States District Judge for the Western District of North Carolina; and LOUISE W. FLANAGAN, Chief United States District Judge for the Eastern District of North Carolina, sitting by designation as a three-judge District Court.

MEMORANDUM OPINION

ROBERT J. CONRAD, JR., Chief Judge.

This matter comes before the three-judge Court on Plaintiffs' Motion for a Preliminary Injunction.[FN1] Due to the proximity of the candidates filing for the 2008 election, we issued an order without accompanying memorandum following the January 25 hearing, denying equitable relief. We now explain our reasoning.

I.

Plaintiffs are citizens of the United States and voters in North Carolina state legislative districts. They filed a complaint and motion for preliminary injunction on November 21, 2007, to rectify alleged constitutional defects in the current redistricting scheme. Defendants are the Executive Director and current members of the State Board of Elections, the Attorney General of the State of North Carolina, and the North Carolina State Conferences of Branches of the National Association for the Advancement of Colored People.

In their complaint, Plaintiffs assert five claims. First, Plaintiffs allege a violation of the Equal Protection Clause "one-person, one-vote" principle, due to the North Carolina General Assembly's failure to incorporate updated census data into its redistricting calculations prior to its most recent (November, 2003) redistricting plan. Plaintiffs also allege that "[t]he failure of the Legislature to use the corrected data was an intentional decision by [former Speaker] Black and his allies to politically benefit from the use of incorrect data by arranging the election districts to maintain their control of the North Carolina House of Representatives."(Compl., Doc. No. 1, at 23). Second, Plaintiffs allege a violation of the Due Process Clause of the Fourteenth Amendment due to the deprivation of a state created right because the North Carolina Supreme Court in its *Pender County*[FN2] decision held that the current redistricting plan violates the North Carolina State constitution. Nonetheless, the state court deferred action on the state constitutional

violation until *after* the next election cycle, ensuring that Plaintiffs' state created voting rights will not be vindicated through at least one more series of elections. Third, Plaintiffs allege a federal Voting Rights Act ("VRA") violation because the current redistricting plan improperly configures the minority population encompassed in the contiguous counties of Pender, Sampson, and New Hanover, which population could be combined to create a valid Section 2 federal VRA district. Fourth, Plaintiffs allege an Equal Protection Clause violation on the basis of racial gerrymandering. Fifth and finally, Plaintiffs allege that the state's failure properly to implement and administer a lawful election plan constitutes a violation of the federal constitutional guarantee of a Republican Form of Government.

In their memorandum in support of motion for preliminary injunction and at hearing on same motion, Plaintiffs focused exclusively on their first claim, alleging violations of the one-person, one-vote principle.

II. BACKGROUND

North Carolina has an extensive history of problematic redistricting efforts tracing back to the 1730s,[FN3] which has generated significant litigation.[FN4] Since the 2000 census, the North Carolina Supreme Court has found the General Assembly's redistricting plans unconstitutional three times.[FN5]To understand the current statewide redistricting plan, we must review North Carolina's recent redistricting efforts.

On March 21, 2000, the Census Bureau released census data showing that North Carolina had a population of 8,049,313 for the purposes of redistricting. (Compl., Doc. No. 1, at 9). Following the decennial census, the North Carolina Constitution requires the General Assembly to redistrict. *See*N.C. Const. art. II, §§ 3, 5. Each Senator and Representative is to be elected by districts that are subject to certain requirements: that each Senator and Representative represent, as nearly as possible, an equal number of inhabitants; that each district consists of contiguous territory; that no counties should be divided; and that the districts, once established, remain unaltered until the next decennial census. *Id.*

On May 1, 2001, the General Assembly legislative services office released a Legislator's Guide for redistricting. The guide advised that the average number of persons each Senator will represent was 160,986 (8,049,313 / 50), and the average number each Representative will represent was 67,078 (8,049,313 / 120). (Compl., Doc. No. 1, at 9). Under the guide, the General Assembly was advised that no redistricting scheme would contain an overall maximum population deviation [FN6] exceeding ten percent in order to comply with federal law, the North Carolina Equal Protection Clause and the requirement under the North Carolina Constitution that Senators and Representatives, as nearly as may be, represent an equal number of inhabitants. *Id.* at 10, 649 S.E.2d 364.

A. *Stephenson I*

In the 2001 regular session, the General Assembly enacted its legislative redistricting plans. A group of litigants ("the Stephenson plaintiffs") filed an action in Johnston County Superior Court on November 13, 2001. The Stephenson plaintiffs alleged that the 2001 Senate and House redistricting plans violated the North Carolina Constitution. The defendants filed a notice of removal asserting federal question jurisdiction pursuant to 28 U.S.C. § 1441 and "refusal clause" jurisdiction pursuant to 28 U.S.C. § 1443(2). The district court remanded the case to the North Carolina Superior Court because the court found that the case did not raise a substantial federal question and the plaintiffs' complaint only raised issues of state law. *Stephenson v. Bartlett,* 180 F.Supp.2d 779, 786 (E.D.N.C.2001).

On remand, the trial court granted plaintiffs' motion for summary judgment on the ground that the 2001 legislative redistricting plans violated the State Constitution. The defendants appealed and the North Carolina Supreme Court considered the issue of whether the General Assembly, in enacting the 2001 legislative redistricting plans, violated the Whole County Provisions ("WCP") of the North Carolina Constitution. *Stephenson v. Bartlett (Stephenson I),* 355 N.C.354, 562 S.E.2d 377, 383-84 (N.C.2002). The Supreme Court reviewed the federal role in redistricting and the historical role of counties in legislative redistricting and concluded that "[t]here is a long-standing tradition of respecting county lines during the redistricting process in this State."*Id.* at 386.The Supreme Court

concluded that the WCP remain "valid and binding upon the General Assembly during the redistricting and reapportionment process ... except to the extent superseded by federal law."*Id.* at 390.The Supreme Court held that the General Assembly enacted its 2001 legislative redistricting plans in violation of the WCP, and therefore the plans were unconstitutional and void. *Id.* at 392.

The Supreme Court then announced a remedial analysis which set out a strict hierarchy. First, the legislative districts required by the VRA must be formed prior to the creation of non-VRA districts. *Id.* at 396-97.To the maximum extent possible, the VRA districts must comply with the legal requirements of the WCP. "In forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent for purposes of compliance with federal 'one-person, one-vote' requirements."[FN7] *Id.* at 397."In counties having a 2000 census population sufficient to support the formation of one non-VRA legislative district ..., the WCP requires that the physical boundaries of any such non-VRA legislative district not cross or traverse the exterior geographic line of any such county."*Id.* When two or more non-VRA legislative districts may be created within a single county, that county should form a single non-VRA district. "Such non-VRA districts shall be compact and shall not traverse the exterior geographic boundary of any such county."*Id.*

After placing all the single counties on the map, all two county combinations that can be drawn are similarly placed on the map and then three county

combinations and so forth. Counties should be combined so that the county groupings are composed with the minimum number of counties per group, and all counties grouped together must be composed of contiguous territory. *Id.* at 383-84.Only after the counties are appropriately grouped, districts are to be drawn within the county groups that minimize the number of county line traversals and construct compact districts which respect communities of interest inside the county groupings. The court emphasized that "[t]he intent underlying the WCP must be enforced to the maximum extent possible; thus, only the smallest number of counties necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard shall be combined."*Id.* at 384.

B. *Stephenson II*

In 2002, the General Assembly tried again and submitted the plans to the Superior Court for its review for compliance with *Stephenson I.* The Superior Court held that the 2002 plans violated the North Carolina Constitution as interpreted in *Stephenson I.* The 2002 elections were held under an interim plan created by the Superior Court and precleared by the Department of Justice.

In 2003, the North Carolina Supreme Court considered whether the Superior Court correctly determined that the General Assembly's 2002 revised redistricting plans were unconstitutional. *Stephenson v. Bartlett (Stephenson II),* 357 N.C.301, 582 S.E.2d 247 (N.C.2003). The Superior Court had concluded that the 2002 revised redistricting plans

failed to be in strict compliance with *Stephenson I* because the plan included "excessive division of counties; deficiencies in county groupings; and substantial failures in compactness, contiguity, and communities of interest."*Id.* at 252.The Supreme Court affirmed the Superior Court's findings that the 2002 plans were unconstitutional. *Id.* at 254.

C. *Pender County*

In November 2003, the General Assembly enacted the 2003 State House Plan.[FN8]The Stephenson plaintiffs filed a motion to enforce their injunctions, but the North Carolina Supreme Court decided that the Stephenson case was not ongoing and therefore the Stephenson plaintiffs would have to file a new complaint. *Stephenson v. Bartlett,* 358 N.C. 219, 595 S.E.2d 112 (N.C.2004). A complaint was filed before the state three-judge panel on May 14, 2004, by the Pender County Commissioners. *Pender County v. Bartlett,* 361 N.C. 491, 649 S.E.2d 364 (N.C.2007). The three-judge panel [FN9] concluded that House District 18 met the three *Gingles*[FN10] threshold preconditions and, based on a totality of the circumstances, the creation of House District 18 as a crossover district was required by Section 2 of the VRA.[FN11]*Id.* at 368.Thus, the panel concluded that Pender County could be split and that the district complied with the legal requirements of the WCP, as set out in *Stephenson I. Id.*

The North Carolina Supreme Court examined whether the current geographic configuration and racial composition of North Carolina House District 18 as established by the 2003 redistricting plan was

required by Section 2 of the VRA. The Supreme Court further considered whether a sufficiently large and geographically compact minority population must constitute a numerical majority of citizens of voting age to trigger Section 2 compliance. The Supreme Court concluded that House District 18's current configuration was not mandated by Section 2. *Id.* at 374.

The court reiterated that the formation of legislative districts must comport with the requirements of the North Carolina Constitution, unless federal law supersedes those provisions. Thus, the court concluded that because House District 18 was not required by Section 2, it must comply with *Stephenson I* and the WCP. *Id* . at 376.Because the 2003 redistricting plan split House District 18 contrary to the requirements of the WCP, the court ordered that it must be redrawn. *Id.* The North Carolina Supreme Court, however, stayed the remedy of redrawing the district until after the 2008 election in order to minimize disruption to the ongoing election cycle.[FN12] *Id.*

On November 21, 2007, members of the North Carolina State Board of Elections who were defendants in the *Pender County* litigation filed a petition seeking *writ of certiorari* from the United States Supreme Court. *Bartlett v. Strickland,* 361 N.C. 491, 649 S.E.2d 364 (N.C.2007), *petition for cert. filed* (U.S. Nov. 21, 2007) (No. 07-689). On March 17, 2008, the Supreme Court granted the petition for *writ of certiorari. See Bartlett v. Strickland,* 361 N.C. 491, 649 S.E.2d 364 (N.C.2007), *cert. granted,*No. 07-689 (U.S. Mar. 17, 2008).

D. Census Data

The 2000 decennial census was completed, and the results were submitted to the States for state-office redistricting purposes, by April 1, 2001, as required by 13 U.S.C. § 141(c). The Census Bureau thereafter reviewed the 2000 census data through its "Census 2000 Count Question Resolution," or "CQR," program. (Defs.' Ex. 4). On February 20, 2003, the Director of Research for the North Carolina General Assembly received a notice from a census official, updating him on the progress of the CQR program in processing challenges from local governments in North Carolina. (Pls.' Ex. 7). The letter promised that the Census Bureau's responses to such local government challenges would be forwarded to the State as the program continued. The additional correspondence would indicate whether a change in census data was forthcoming, and if so, would "inform [the State] of the census blocks affected."*Id.*

On May 14, 2003, the Census Bureau sent a letter to Orange County officials informing them that "[o]ur research found an error in the geographic assignment of group quarters in various blocks within the town of Chapel Hill" and, further, that census officials had "identified housing units that were erroneously included in Census 2000 due to processing errors."(Pls.' Ex. 8, 9). The letter promised that "Orange County will soon receive a Certification Letter from the Director of the Census Bureau stating Orange County's housing unit and associated population counts."(Pls.'s Ex. 8).

On September 30, 2003, census officials mailed "an official statement of the revised Census 2000 population and housing units counts for Orange County," reflecting a downward correction of 2,696 persons in the census totals for the county. (Pls.' Ex. 10). The letter did not further divide or detail the characteristics of those 2,696 persons, and it did not expressly provide corrections on a block-by-block level (called "block-level data"). Similar letters were sent to local and state officials regarding challenges in other counties in the state, with many corrections (all smaller than that in Orange County) certified.

Less than two months later, on November 25, 2003, the legislature approved house and senate redistricting plans in response to *Stephenson I* and *Stephenson II* (the "2003 redisricting plan"). The 2003 redistricting plan employed the *Stephenson* algorithm for drawing districts, using the original 2000 census data that did not reflect the CQR program corrections (the "uncorrected census data"). On June 10, 2004, the CQR program was completed, and the final detailed block-level data were posted to the census website (the "corrected census data"). (*See* Defs. Ex. 3 (providing 2 pages of the 100-page report of North Carolina corrections)); full report *available at* www.census.gov/prod/cen2000/notes/blks-37.xls. The final data do not indicate how the racial makeup of the blocks was affected by the corrections. The CQR corrected data carried a disclaimer that it was not to be used for redistricting purposes: "Census counts used for Congressional apportionment and legislative redistricting and the Census 2000 data products remain unchanged."(Pls.Ex.10).

Plaintiffs allege that the North Carolina General Assembly improperly refused to incorporate corrected census data into its redistricting calculus when it passed the November 2003 redistricting scheme. Plaintiffs claim that the use of the uncorrected census data creates a ripple effect of violations of the one-person, one-vote requirement of *Reynolds v. Sims,* 377 U.S. 533, 577, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and necessitates statewide redistricting. Plaintiffs allege that the General Assembly intentionally used the incorrect census data to maintain its current political dominance. They request this Court grant a preliminary injunction to enjoin Defendants from continuing to use the 2003 plans during the 2008 election.

III. DISCUSSION

We undertake this analysis cognizant of the importance of insuring that every voter in North Carolina has an equal voice in electing his or her own representatives. The Supreme Court has acknowledged the preeminence of voting and has stated "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."*Wesberry v. Sanders,* 376 U.S. 1, 17, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964).

The parties agree that the issue before this Court is whether Plaintiffs are entitled to a preliminary injunction enjoining Defendants from conducting elections in 2008 utilizing the 2003 legislative districts. "[P]reliminary injunctions are extraordinary remedies involving the exercise of very

far-reaching power to be granted only sparingly and in limited circumstances."*Microstrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir.2001) (internal quotation marks omitted). In order to grant injunctive relief, Plaintiffs have to show: "(1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied, (2) the likelihood of harm to the defendant if the requested relief is granted, (3) the likelihood that the plaintiff will succeed on the merits, and (4) the public interest."*Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir.1991)."[T]he balance of harm evaluation should precede the determination of the degree by which the plaintiff must establish the likelihood of success on his part."*Id.* at 813.If, after balancing the irreparable harm to the plaintiff against the irreparable harm to the defendant, the balance tips "decidedly" in the favor of the plaintiff, a preliminary injunction would be appropriate if the plaintiff "raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation."*Id.* at 812-13 (internal quotation marks omitted). If the balance tips away from the plaintiff toward equivalency, the plaintiff must demonstrate its entitlement to a preliminary injunction with "a very clear and strong case," because "if there is doubt as to the probability of plaintiff's ultimate success on the merits, the preliminary injunction must be denied."*Id.* at 813."[T]he decision to grant a preliminary injunction is discretionary with the district court and may not be set aside on appeal unless an abuse of discretion is shown."*Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 358 (4th

Cir.1991) (internal quotation marks omitted).

A. Plaintiffs' Irreparable Injury/Likelihood of Success

Deprivation of a constitutional right, even for a short period of time, constitutes irreparable harm. *Elrod v. Bums,* 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Although the balance of harms inquiry ordinarily precedes an analysis of a plaintiff's likelihood of success on the merits, when the harm alleged by the plaintiff is the deprivation of a constitutional right, the likelihood of success on the merits is so "inseparably linked" to the proving of an actual harm that the court may proceed directly to consider the merits of the plaintiff's action. *Giovani Carandola, Ltd. v. Bason,* 303 F.3d 507, 511 (4th Cir.2002) (internal quotation marks omitted). Here, where Plaintiffs allege solely constitutional harms, determination of irreparable harm requires determining Plaintiffs' likelihood of success on the merits, and we turn to this question first.

i. One-person, One-vote Violation

With regard to Plaintiffs' likelihood of success on the merits on their one-person, one-vote violation, the principal question here is whether the General Assembly had a duty to use the corrected census data. Without this showing, the state redistricting plan as currently devised falls within the permissible limits of a minor deviation, notwithstanding the State Constitutional violations found by the North Carolina Supreme Court in *Pender County.*Since the duty of redistricting falls

primarily within the purview of the state legislature,[FN13] this Court is hesitant to intervene without a clear showing of likelihood of success on the merits.

The Fourteenth Amendment assures that "representative government in this country is one of equal representation for equal numbers of people."*Reynolds,* 377 U.S. at 560-61. The Equal Protection Clause requires only "that a State make an honest and good faith effort to construct districts ... as nearly of equal population as is practicable."*Id.* at 577.In the state legislative redistricting context, the Fourteenth Amendment's Equal Protection Clause has been interpreted only to prohibit substantial population deviations among districts. That is, States have more flexibility in formulating redistricting plans for the state legislative seats by requiring only substantial population equality as opposed to strict population equality required in congressional redistricting plans. *See Gaffney v. Cummings,* 412 U.S. 735, 748-49, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973). The Supreme Court has recognized that "some deviations from population equality may be necessary to permit the States to pursue other legitimate objectives" and that, generally, a "maximum population deviation under 10% falls within th[e] category of minor deviations."*Brown v. Thomson,* 462 U.S. 835, 842, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983).[FN14] On the contrary, a plan with a maximum population deviation of 10% or higher "creates a prima facie case of discrimination and therefore must be justified by the State."*Id.* at 842-43.

Plaintiffs assert that the failure to use the corrected census data resulted in a deviation greater than 10% for certain counties which proves their prima facie case.[FN15](*See* Pls.' Ex. 2). Plaintiffs rely on *Utah v. Evans,* 536 U.S. 452, 122 S.Ct. 2191, 153 L.Ed.2d 453 (2002), *Kirkpatrick v. Preisler,* 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969), and *Karcher v. Daggett,* 462 U.S. 725, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983), to support their assertion that Defendants had a duty to use the corrected census data. We find that those cases do not support the imposition of a duty to use the corrected census data. Instead, we conclude that the General Assembly is permitted, but not required, to use the corrected census data.

In *Utah v. Evans,* the State of Utah sued the Secretary of Commerce, challenging the use of a particular census interpolation method known as "hot deck imputation." The method resulted in Utah being awarded one fewer seat in the House of Representatives than it would have been awarded had no interpolation method been used. North Carolina, the beneficiary of an additional seat via the method, intervened and challenged Utah's standing on redressability grounds. In particular, North Carolina argued that the reticulated statutory scheme for the taking of a decennial census, the certification of results, and, finally, the awarding of Representatives left no room for post-hoc, inter-decennial challenges that would require re-certifying results and re-allocating Representatives. *See Utah v. Evans,* 536 U.S. at 461. The Court disagreed, noting that the statutes did not cover the proper procedure to be implemented should the original

certification "turn out to contain, or to reflect, a serious mistake."*Id.* at 462.Instead, the statutory language "is open to a more flexible reading that would *permit* correction of a certificate found to rest upon a serious error-say, a clerical, a mathematical, or a calculation error, in census data."*Id.* (emphasis added). If the error were discovered in a timely fashion, re-allocating Representatives "makes good sense." *Id.* Plaintiffs contend that if Congress would have to reapportion based upon a mathematical error, then a state would be obliged to rely on the corrected census data during redistricting.

In *Kirkpatrick v. Preisler,* the Court recognized that "[s]ituations may arise where substantial population shifts [between censuses] can be anticipated."394 U.S. at 535. The Court held that "States that are redistricting *may* properly consider" such shifts, but only if "these shifts can be predicted with a high degree of accuracy" and are "thoroughly documented and applied throughout the State in a systematic, not an *ad hoc,* manner."*Id.* (emphasis added). Plaintiffs assert that the corrected census data regarding the mathematical error in Orange County was well-documented and certified by the Census Bureau. Thus, Plaintiffs conclude, the General Assembly was required to use the corrected data during redistricting.

In *Karcher v. Daggett,* the Supreme Court discussed the census data relevant to the apportionment plan for New Jersey. The Court stated that the Census Bureau had released the preliminary figures and subsequently released two corrections. The Court concluded that"[b]ecause this last correction was not

available to the legislature at the time it enacted the plan at issue, we need not consider it." *Karcher,* 462 U.S. at 728 n. 1. Since the General Assembly had access to the corrected data before redistricting in 2003, Plaintiffs assert that like the *Karcher* Court, this Court should use the corrected figures in measuring the one-person, one-vote violation.

This Court concludes that these cases use permissive, not mandatory, language when referring to the use of corrected census data. This Court recognizes the fact that states conducting redistricting years after the decennial census are operating under a legal fiction. *See Georgia v. Ashcroft,* 539 U.S. 461, 488 n. 2, 123 S.Ct. 2498, 156 L.Ed.2d 428 (2003) ("[B]efore the new census, States operate under the legal fiction that even 10 years later, the plans are constitutionally apportioned."). Those circumstances, as well as the inherently legislative nature of the redistricting function, support the granting of deference to the judgment of the General Assembly in deciding which data to use. *Wise v. Lipscomb,* 437 U.S. 535, 539, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978) ("The [Supreme] Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt."). In the absence of a duty to use the corrected census data, Plaintiffs cannot show a violation of the one-person, one-vote requirement. Thus, we conclude that Plaintiffs cannot claim they are irreparably harmed and have not shown a likelihood of success on the merits.

ii. Good faith

Plaintiffs' secondary argument is that Defendants had a good faith duty to use the most accurate data available at the time of redistricting when constructing the Senate and House legislative districts. *See Reynolds,* 377 U.S. at 577 ("[T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."). Plaintiffs contend that because the Census Bureau had notified the General Assembly of the mathematical error prior to the enactment of the 2003 districts, the *Reynolds* duty of good faith required the General Assembly to use the most accurate data available at the time of redistricting. While this argument has superficial appeal, it ignores that fact that redistricting is primarily a legislative function. In the absence of an absolute duty to use corrected census data, this Court believes that the General Assembly could properly choose to use the uncorrected census data.

Plaintiffs additionally argued that even if the court finds no duty to use the corrected census data, they can still prevail on the merits by showing that Defendants acted in bad faith in constructing the 2003 redistricting plan. Plaintiffs have made some vague allegations of a conspiracy surrounding former Speaker James Black and his supporters and assert that the incumbents who positively benefitted from the use of the uncorrected census data would have included allies of former Speaker Black. (*See* Compl., Doc. No. 1, at 23). In order to succeed, Plaintiffs must provide a link between the conspiracy and the

use of the uncorrected data. Plaintiffs must provide evidence that the redistricting process had a "taint of arbitrariness or discrimination." *Daly v. Hunt,* 93 F.3d 1212, 1220 (4th Cir.1996) (noting that a maximum deviation of below 10% "does not completely insulate a state's districting plan from attack" but holding that "[t]o survive summary judgment, the plaintiff would have to produce further evidence to show that the apportionment process had a taint of arbitrariness or discrimination" (internal quotation marks omitted)). At this stage in the proceedings, Plaintiffs cannot prevail on the bad faith claim for lack of evidence. Plaintiffs have offered little more than conclusory allegations of a conspiracy to show invidious intent. Since Plaintiffs have not shown that the General Assembly had a duty to use the corrected data or that it otherwise proceeded in bad faith, we find Plaintiffs have provided insufficient proof to show a likelihood of success on the merits.

B. Defendants' Harm

Defendants argue that they will be significantly harmed if this Court were to enjoin them from conducting the 2008 election using the 2003 legislative districts. "Because state officials are the parties against whom the injunction is sought, and they represent the public interest, consideration of the harm to them should the injunction issue merges with consideration of the public interest."*Jackson v. Leake*, 476 F.Supp.2d 515, 530 (E.D.N.C.2006). The filing of candidates commenced on February 11, 2008, and the primary is scheduled to be held on May 6, 2008. Invalidating any of the districts would

likely disrupt the electoral process. Some of the prospective candidates and voters have begun to prepare for the 2008 elections in reliance on the existing state district plan. Any delay could affect "the ability of North Carolinians to participate meaningfully in the presidential primaries," and granting a preliminary injunction will otherwise "disrupt an orderly election process." (Defs.' Mem. Opp., Doc. No. 41, at 13). We find that Defendants and the public interest in holding an orderly election would be substantially harmed if preliminary injunctive relief were granted.

IV. Conclusion

In balancing the foregoing factors, this Court concludes that a preliminary injunction is not warranted. We find that the balancing of the harms tips decidedly in favor of Defendants since Plaintiffs have failed to show any irreparable harm. Absent any evidence of invidious intent on the part of the General Assembly, there is an insufficient amount of proof to grant the extraordinary remedy of a preliminary injunction.

Accordingly, Plaintiffs' motion for preliminary injunction is **DENIED.**

FN1."A district court of three judges shall be convened ... when an action is filed challenging the constitutionality of ... the apportionment of any statewide legislative body."28 U.S.C.A. § 2284 (West 2006).

FN2.*Pender County v. Bartlett,* 361 N.C. 491, 649

S.E.2d 364 (N.C.2007).

FN3. Justice Scalia noted this history of political gerrymandering in North Carolina dating back to the 1730s in his plurality opinion in *Vieth v. Jubelirer,* 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004)."In 1732, two members of His Majesty's Council and the attorney general and deputy inspector and comptroller general of affairs of the Province of North Carolina reported that the Governor had proceeded to 'divide old Precincts established by Law, & to enact new Ones in Places, whereby his Arts he has endeavored to prepossess People in a future election according to his desire, his Designs herein being ... either to endeavor by his means to get a Majority of his creatures in the Lower House' or to disrupt the assembly's proceedings."*Id.* at 274 (quoting 3 Colonial Records of North Carolina 380-81 (W. Saunders ed. 1886)).

FN4.*See, e.g., Easley v. Cromartie,* 532 U.S. 234, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001); *Hunt v. Cromartie,* 526 U.S. 541, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999); *Shaw v. Hunt,* 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996); *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993); *Thornburg v. Gingles,* 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986); *Daly v. Hunt,* 93 F.3d 1212 (4th Cir.1996); *Pope v. Blue,* 809 F.Supp. 392 (W.D.N.C.1992), *aff'd,*506 U.S. 801, 113 S.Ct. 30, 121 L.Ed.2d 3 (1992).

FN5.*See Stephenson v. Bartlett (Stephenson I),* 355 N.C.354, 562 S.E.2d 377, 384 (N.C.2002); *Stephenson v. Bartlett (Stephenson II),* 357 N.C.301, 582 S.E.2d

247, 254 (N.C.2003); *Pender County,* 649 S.E.2d at 374-76.

FN6. Overall maximum population deviation is a term of art used in the redistricting context. The Fourth Circuit has stated that "to calculate maximum deviation, the court first constructs a hypothetical ideal district by dividing the total population of the political unit (e.g., state or county) by the total number of representatives who serve that population. Then, the court determines how much the actual population of each district varies from the population of the ideal district. This deviation is expressed as a percentage of the ideal population. Maximum deviation is the sum of the absolute value of the deviation of the district with the smallest population and that of the district with the largest population."*Daly,* 93 F.3d at 1216 n. 2.

FN7. This standard enunciated by the North Carolina Supreme Court is more restrictive than that imposed by the United States Supreme Court in *Brown v. Thomson,* 462 U.S. 835, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983), and interpreted by the Fourth Circuit in *Daly v. Hunt,* 93 F.3d 1212, 1216 n. 2 (4th Cir.1996). Under a state plan in which the least-populated district deviates 5.9% below the ideal, and the most-populated district deviates 3.9% above the ideal, the *Brown / Daly* calculation yields a maximum population deviation of 9.8%, within the 10% safe harbor absent invidious intent. Under *Stephenson I,* however, the same plan would violate the one-person, one-vote requirement by virtue of the least-populated district deviating more than 5% from the ideal, without reference to the percentage deviation

of the most-populated district.

FN8. The 2003 State House Plan is the redistricting plan challenged by Plaintiffs in this case.

FN9."Any action challenging the validity of any act of the General Assembly that apportions or redistricts State legislative ... districts shall be filed in the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County."N.C. Gen.Stat. § 1-267.1 (2007).

FN10.*Thornburg v. Gingles,* 478 U.S. at 50-51.

FN11. Section 2(a) of the VRA applies to all states and prohibits all redistricting plans from denying the rights of any citizen "to vote on account of race or color [or membership in a language minority group]."42 U.S.C. § 1973(a) (2000). Subsection (b) further states that a citizen's right to vote is denied or abridged if members of a minority group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."42 U.S.C. § 1973(b).

FN12. At oral argument, Plaintiffs indicated that the General Assembly would be required to redistrict when it reconvened in May 2008, following the North Carolina Supreme Court's order. This Court disagrees with Plaintiffs' assertion and concludes that the Supreme Court stayed its redistricting order until after the 2008 elections. Thus, the General Assembly is not required to redistrict until after

November 2008.

FN13.*See Reynolds v. Sims,* 377 U.S. at 586 ("[L]egislative reapportionment is primarily a matter for legislative consideration and determination.").

FN14. The Fourth Circuit has discerned from its review of subsequent Supreme Court cases an algorithm for calculating the maximum population deviation for purposes of compliance with *Brown.See Daly,* 93 F.3d at 1216 n. 2. The court should "first construct[ ] a hypothetical ideal district by dividing the total population of the political unit ... by the total number of representatives who serve that population."*Id.* Using the empirical data of the challenged districts, the court then calculates the percentage by which the actual population differs from the "ideal" population per district. These percentages can be positive, as would be the case for an "under-represented" district, or negative, as would be the case for an "over-represented" district. Lastly, the court compares the district with the largest negative percentage with the district with the largest positive percentage, and adds the ("absolute value," or positive value, of the) two percentages. That sum represents the maximum population deviation that, if over 10%, signals that Plaintiffs in the litigation have proved a prima facie violation of the one-person, one-vote principle. *Id.*

FN15. In the house districts, for example, using the corrected census data shows that the least-populated district is District 56 in Orange County, with a deviation of 8.84% below the ideal, while the most-populated district is District 6 in Pitt and Beaufort

Counties, with a deviation of 5.42% above the ideal, for a "maximum population deviation" of 14.26%. *See* Affidavit of John B. Morgan ¶ 12. In the senate districts, the least-populated district is District 23 in Orange and Person Counties, with a deviation of 6.07% below the ideal, while the most-populated district is District 17 in Wake County, with a deviation of 5.02% above the ideal, for a "maximum population deviation" of 11.09%. *See id.* ¶ 13.

APPENDIX B

JOSEPH DEAN, et al., *Plaintiffs,* *v.* **LARRY LEAKE,** in his official capacity as Chairman of the North Carolina State Board of Elections, et al., *Defendants,* *and* **NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP,** *Defendant-Intervenor*	**Civil Action No. 2:07-CV-00051-FL**

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is given that Joseph Dean, Alfred Freimark, Homer Marshall, Jack Steer, Mikele Haywood, Kimberley Hendrix, Dena Barnes, Dwight Story, Robert Rucho, William (Frank) Mitchell, Mike Clampitt, Eric Weaver and Leon Bonner, *Plaintiffs*, appeal to the Supreme Court of the United States from the second order and memorandum opinion denying the Plaintiffs' Motion for Preliminary Injunction entered in this action on March 17, 2008.

This appeal is taken pursuant to Title 28, United States Code, Section 1253.

Dated: March 20, 2008.

/s/Robert N. Hunter, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2008, I electronically filed the foregoing Plaintiffs' Motion to Extend Time to File Rule 26(f) Joint Report on the Clerk of court using the CM/ECF system which will send notification of such filing to the following:

Alexander McC. Peters, Susan K. Nichols and Tiare B. Smiley, Counsel for Defendants

Anita S. Earls, Southern Coalition for Social Justice and Angela Ciccolo, Interim General Counsel NAACP, Attorneys for Defendant-Intervenor

/s/ Robert N. Hunter, Jr.
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APPENDIX C

Exhibit 1
Table of house districts, in district order.
Deviations are above or below the ideal
district size for NC House of Representatives

HSE DIST.	CORRECTED POPULATION	DEV-IATION	% DEV-IATION
1	64,121	-2933	-4.37%
2	63,666	-3388	-5.05%
3	64,140	-2914	-4.35%
4	63,948	-3106	-4.63%
5	64,618	-2436	-3.63%
6	70,689	3635	5.42%
7	63,744	-3310	-4.94%
8	66,818	-236	-0.35%
9	66,716	-338	-0.50%
10	69,128	2074	3.09%
11	70,357	3303	4.93%
12	63,708	-3346	-4.99%
13	69,764	2710	4.04%

14	67,606	552	0.82%
15	67,864	810	1.21%
16	68,294	1240	1.85%
17	64,135	-2919	-4.35%
18	63,772	-3282	-4.89%
19	69,343	2289	3.41%
20	63,755	-3299	-4.92%
21	70,417	3363	5.02%
22	70,244	3190	4.76%
23	64,907	-2147	-3.20%
24	64,510	-2544	-3.79%
25	63,755	-3299	-4.92%
26	70,352	3298	4.92%
27	66,874	-180	-0.27%
28	70,355	3301	4.92%
29	64,967	-2087	-3.11%
30	64,523	-2531	-3.77%
31	64,023	-3031	-4.52%
32	66,636	-418	-0.62%

33	70,321	3267	4.87%
34	69,711	2657	3.96%
35	70,471	3417	5.10%
36	70,367	3313	4.94%
37	70,398	3344	4.99%
38	70,243	3189	4.76%
39	69,628	2574	3.84%
40	69,841	2787	4.16%
41	66,886	-168	-0.25%
42	63,745	-3309	-4.93%
43	63,986	-3068	-4.58%
44	66,909	-145	-0.22%
45	70,357	3303	4.93%
46	63,740	-3314	-4.94%
47	65,310	-1744	-2.60%
48	63,839	-3215	-4.79%
49	64,516	-2538	-3.79%
50	64,508	-2546	-3.80%
51	70,308	3254	4.85%

52	70,231	3177	4.74%
53	69,925	2871	4.28%
54	67,257	203	0.30%
55	65,424	-1630	-2.43%
56	61,127	-5927	-8.84%
57	70,423	3369	5.02%
58	70,419	3365	5.02%
59	69,971	2917	4.35%
60	69,418	2364	3.53%
61	70,408	3354	5.00%
62	70,409	3355	5.00%
63	65,174	-1880	-2.80%
64	65,626	-1428	-2.13%
65	66,769	-285	-0.43%
66	70,430	3376	5.03%
67	69,519	2465	3.68%
68	70,423	3369	5.02%
69	70,161	3107	4.63%
70	65,833	-1221	-1.82%

71	63,731	-3323	-4.96%
72	63,731	-3323	-4.96%
73	63,813	-3241	-4.83%
74	63,762	-3292	-4.91%
75	63,902	-3152	-4.70%
76	66,034	-1020	-1.52%
77	64,306	-2748	-4.10%
78	64,638	-2416	-3.60%
79	63,782	-3272	-4.88%
80	70,245	3191	4.76%
81	64,129	-2925	-4.36%
82	65,483	-1571	-2.34%
83	65,580	-1474	-2.20%
84	63,733	-3321	-4.95%
85	67,428	374	0.56%
86	63,868	-3186	-4.75%
87	63,705	-3349	-4.99%
88	64,534	-2520	-3.76%
89	63,759	-3295	-4.91%

90	63,751	-3303	-4.93%
91	69,870	2816	4.20%
92	63,848	-3206	-4.78%
93	67,077	23	0.03%
94	65,632	-1422	-2.12%
95	66,249	-805	-1.20%
96	65,105	-1949	-2.91%
97	63,780	-3274	-4.88%
98	70,355	3301	4.92%
99	69,971	2917	4.35%
100	70,380	3326	4.96%
101	66,901	-153	-0.23%
102	69,833	2779	4.14%
103	70,309	3255	4.85%
104	70,400	3346	4.99%
105	70,308	3254	4.85%
106	69,114	2060	3.07%
107	67,799	745	1.11%
108	70,352	3298	4.92%

109	70,418	3364	5.02%
110	70,421	3367	5.02%
111	67,909	855	1.28%
112	70,392	3338	4.98%
113	66,537	-517	-0.77%
114	66,764	-290	-0.43%
115	70,295	3241	4.83%
116	69,271	2217	3.31%
117	70,294	3240	4.83%
118	63,734	-3320	-4.95%
119	63,728	-3326	-4.96%
120	63,745	-3309	-4.93%

Exhibit 2
Table of House District Deviations, ordered from most underpopulated to most overpopulated

HSE DIST.	CORRECTED POPULATION	DEV-IATION	% DEV-IATION
56	61,127	-5927	-8.84%
2	63,666	-3388	-5.05%
87	63,705	-3349	-4.99%
12	63,708	-3346	-4.99%
119	63,728	-3326	-4.96%
71	63,731	-3323	-4.96%
72	63,731	-3323	-4.96%
84	63,733	-3321	-4.95%
118	63,734	-3320	-4.95%
46	63,740	-3314	-4.94%
7	63,744	-3310	-4.94%
42	63,745	-3309	-4.93%
120	63,745	-3309	-4.93%

90	63,751	-3303	-4.93%
20	63,755	-3299	-4.92%
25	63,755	-3299	-4.92%
89	63,759	-3295	-4.91%
74	63,762	-3292	-4.91%
18	63,772	-3282	-4.89%
97	63,780	-3274	-4.88%
79	63,782	-3272	-4.88%
73	63,813	-3241	-4.83%
48	63,839	-3215	-4.79%
92	63,848	-3206	-4.78%
86	63,868	-3186	-4.75%
75	63,902	-3152	-4.70%
4	63,948	-3106	-4.63%
43	63,986	-3068	-4.58%
31	64,023	-3031	-4.52%
1	64,121	-2933	-4.37%
81	64,129	-2925	-4.36%

17	64,135	-2919	-4.35%
3	64,140	-2914	-4.35%
77	64,306	-2748	-4.10%
50	64,508	-2546	-3.80%
24	64,510	-2544	-3.79%
49	64,516	-2538	-3.79%
30	64,523	-2531	-3.77%
88	64,534	-2520	-3.76%
5	64,618	-2436	-3.63%
78	64,638	-2416	-3.60%
23	64,907	-2147	-3.20%
29	64,967	-2087	-3.11%
96	65,105	-1949	-2.91%
63	65,174	-1880	-2.80%
47	65,310	-1744	-2.60%
55	65,424	-1630	-2.43%
82	65,483	-1571	-2.34%

83	65,580	-1474	-2.20%
64	65,626	-1428	-2.13%
94	65,632	-1422	-2.12%
70	65,833	-1221	-1.82%
76	66,034	-1020	-1.52%
95	66,249	-805	-1.20%
113	66,537	-517	-0.77%
32	66,636	-418	-0.62%
9	66,716	-338	-0.50%
114	66,764	-290	-0.43%
65	66,769	-285	-0.43%
8	66,818	-236	-0.35%
27	66,874	-180	-0.27%
41	66,886	-168	-0.25%
101	66,901	-153	-0.23%
44	66,909	-145	-0.22%
93	67,077	23	0.03%
54	67,257	203	0.30%

85	67,428	374	0.56%
14	67,606	552	0.82%
107	67,799	745	1.11%
15	67,864	810	1.21%
111	67,909	855	1.28%
16	68,294	1240	1.85%
106	69,114	2060	3.07%
10	69,128	2074	3.09%
116	69,271	2217	3.31%
19	69,343	2289	3.41%
60	69,418	2364	3.53%
67	69,519	2465	3.68%
39	69,628	2574	3.84%
34	69,711	2657	3.96%
13	69,764	2710	4.04%
102	69,833	2779	4.14%
40	69,841	2787	4.16%

91	69,870	2816	4.20%
53	69,925	2871	4.28%
59	69,971	2917	4.35%
99	69,971	2917	4.35%
69	70,161	3107	4.63%
52	70,231	3177	4.74%
38	70,243	3189	4.76%
22	70,244	3190	4.76%
80	70,245	3191	4.76%
117	70,294	3240	4.83%
115	70,295	3241	4.83%
51	70,308	3254	4.85%
105	70,308	3254	4.85%
103	70,309	3255	4.85%
33	70,321	3267	4.87%
26	70,352	3298	4.92%
108	70,352	3298	4.92%
28	70,355	3301	4.92%

98	70,355	3301	4.92%
11	70,357	3303	4.93%
45	70,357	3303	4.93%
36	70,367	3313	4.94%
100	70,380	3326	4.96%
112	70,392	3338	4.98%
37	70,398	3344	4.99%
104	70,400	3346	4.99%
61	70,408	3354	5.00%
62	70,409	3355	5.00%
21	70,417	3363	5.02%
109	70,418	3364	5.02%
58	70,419	3365	5.02%
110	70,421	3367	5.02%
57	70,423	3369	5.02%
68	70,423	3369	5.02%
66	70,430	3376	5.03%

35	70,471	3417	5.10%
6	70,689	3635	5.42%

APPENDIX D

Exhibit 3
Table of Senate District deviations, in district order. Deviations are above or below the ideal district size for NC Senate

SEN DIST.	CORRECTED POPULATION	DEV-IATION	% DEV-IATION
1	158,595	-2335	-1.451%
2	163,840	2910	1.808%
3	152,336	-8594	-5.340%
4	158,224	-2706	-1.681%
5	160,226	-704	-0.437%
6	160,736	-194	-0.121%
7	158,684	-2246	-1.396%
8	168,972	8042	4.997%
9	160,327	-603	-0.375%
10	168,860	7930	4.928%
11	161,196	266	0.165%
12	156,512	-4418	-2.745%

13	156,891	-4039	-2.510%
14	152,862	-8068	-5.013%
15	152,971	-7959	-4.946%
16	153,023	-7907	-4.913%
17	169,010	8080	5.021%
18	168,856	7926	4.925%
19	167,660	6730	4.182%
20	152,995	-7935	-4.931%
21	167,581	6651	4.133%
22	165,787	4857	3.018%
23	151,154	-9776	-6.075%
24	154,301	-6629	-4.119%
25	165,937	5007	3.111%
26	168,953	8023	4.985%
27	164,775	3845	2.389%
28	157,613	-3317	-2.061%
29	157,293	-3637	-2.260%

30	162,955	2025	1.258%
31	153,025	-7905	-4.912%
32	153,042	-7888	-4.902%
33	168,881	7951	4.941%
34	165,175	4245	2.638%
35	159,811	-1119	-0.695%
36	153,551	-7379	-4.585%
37	162,318	1388	0.862%
38	163,463	2533	1.574%
39	167,629	6699	4.163%
40	165,921	4991	3.101%
41	165,273	4343	2.699%
42	168,522	7592	4.718%
43	162,147	1217	0.756%
44	166,531	5601	3.480%
45	166,312	5382	3.344%
46	159,188	-1742	-1.082%
47	159,046	-1884	-1.171%

48	160,760	-170	-0.106%
49	153,067	-7863	-4.886%
50	153,698	-7232	-4.494%

Exhibit 4
Table of Senate District deviations, ordered from most underpopulated to most overpopulated

SEN DIST.	CORRECTED POPULATION	DEV-IATION	% DEV-IATION
23	151,154	-9776	-6.075%
3	152,336	-8594	-5.340%
14	152,862	-8068	-5.013%
15	152,971	-7959	-4.946%
20	152,995	-7935	-4.931%
16	153,023	-7907	-4.913%
31	153,025	-7905	-4.912%
32	153,042	-7888	-4.902%
49	153,067	-7863	-4.886%

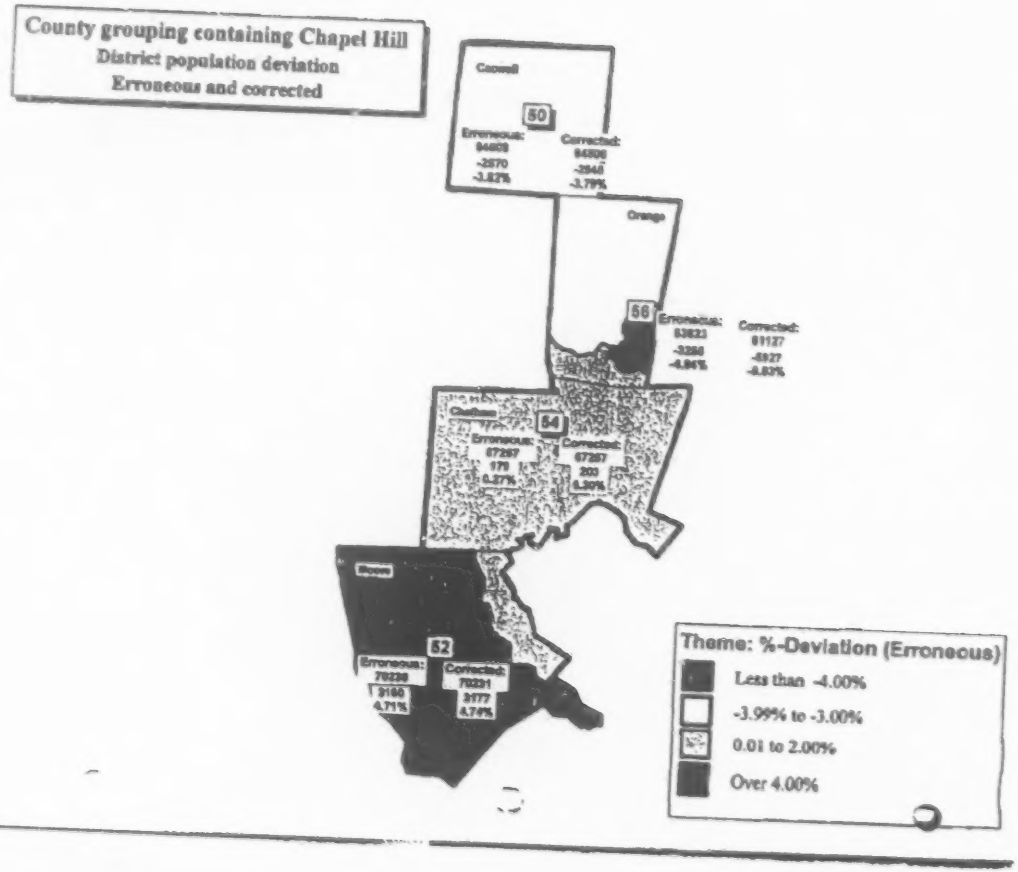
36	153,551	-7379	-4.585%
50	153,698	-7232	-4.494%
24	154,301	-6629	-4.119%
12	156,512	-4418	-2.745%
13	156,891	-4039	-2.510%
29	157,293	-3637	-2.260%
28	157,613	-3317	-2.061%
4	158,224	-2706	-1.681%
1	158,595	-2335	-1.451%
7	158,684	-2246	-1.396%
47	159,046	-1884	-1.171%
46	159,188	-1742	-1.082%
35	159,811	-1119	-0.695%
5	160,226	-704	-0.437%
9	160,327	-603	-0.375%
6	160,736	-194	-0.121%
48	160,760	-170	-0.106%

11	161,196	266	0.165%
43	162,147	1217	0.756%
37	162,318	1388	0.862%
30	162,955	2025	1.258%
38	163,463	2533	1.574%
2	163,840	2910	1.808%
27	164,775	3845	2.389%
34	165,175	4245	2.638%
41	165,273	4343	2.699%
22	165,787	4857	3.018%
40	165,921	4991	3.101%
25	165,937	5007	3.111%
45	166,312	5382	3.344%
44	166,531	5601	3.480%
21	167,581	6651	4.133%
39	167,629	6699	4.163%
19	167,660	6730	4.182%
42	168,522	7592	4.718%

18	168,856	7926	4.925%
10	168,860	7930	4.928%
33	168,881	7951	4.941%
26	168,953	8023	4.985%
8	168,972	8042	4.997%
17	169,010	8080	5.021%

APPENDIX E

Population of Chapel Hill in Orange County
29
68
Chapel Hill
50
54


County grouping containing Chapel Hill
District population deviation
Erroneous and corrected
Caswell
50
Erroneous:
94809
-2570
-1.83%
Corrected:
94936
-2443
-1.79%
Orange
56
Erroneous:
83823
-3356
-4.84%
Corrected:
81127
-6927
-8.83%
Chatham
54
Erroneous:
67257
170
0.27%
Corrected:
67257
203
0.30%
Rowan
52
Erroneous:
70239
3188
4.71%
Corrected:
70231
3177
4.74%
Theme: %-Deviation (Erroneous)
Less than -4.00%
-3.99% to -3.00%
0.01 to 2.00%
Over 4.00%

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA NORTHERN DIVISION

JOSEPH DEAN, ALFRED FREIMARK, HOMER MARSHALL JACK STEER, MIKELE HAYWOOD; KIMBERLEY HENDRIX, DEANA BARNES, DWIGHT STORY, ROBERT RUCHO, WILLIAM (FRANK) MITCHELL, MIKE CLAMPITT and **LEON BONNER**

Plaintiffs,

v.

GARY BARTLETT, in his official capacity as Executive Director of the State Board of Elections, **LARRY LEAKE**, in his official capacity as Chairman of the North Carolina State Board of Elections; **GENEVIEVE C. SIMS**, in her official capacity as a Member of the State Board of Elections; **ROBERT B. CORDLE**, in his official capacity as a Member of the State Board of Elections; **LORRAINE G. SHINN**, in her official capacity as a Member of the State Board of Elections; and **CHARLES WINFREE**, in his official capacity as a Member of the State Board of Elections, and **ROY COOPER**, in his official capacity as the North Carolina Attorney General,

Defendants

Civil Action No.

DECLARATION OF JOEL RAUPE

I, Joel Craig Raupe, under penalty of perjury, do hereby make the following declaration:

1. My name is Joel Raupe. I am over eighteen years of age and am fully competent to make this Declaration. Except as stated on information and belief, I have personal knowledge of all matters stated in this Declaration.

2. Between January 1999 and April 2004, I was employed by the North Carolina General Assembly as administrative assistant to Senator Patrick Ballantine, Minority leader of the North Carolina Senate. My duties included monitoring and advising the Minority Leader and Members the Senate Republican Caucus on legislation, including factual issues regarding redistricting.

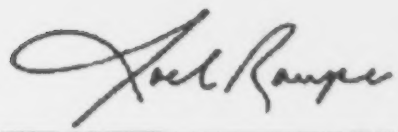
3. I have been custodian of Senator Ballantine's Email from the General Assembly redistricting staff and have made a thorough search of communications from said staff sent to the Minority Leader during the January1, 2003 to January 1, 2004 time frame. My search reveals no Email from said staff alerting Senator Ballantine to population changes the Census Bureau found in Orange County.

4. I do not recall receiving this information from said staff.

5. Attached to this affidavit as Exhibits are true copies of the documents showing transmittal of information to Senator Ballantine immediately prior to the 2003 Extra Session on Redistricting of the North Carolina General Assembly in November 2003.

Pursuant to 28 USC §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 3rd day of January, 2008



Joel Raupe

APPENDIX G

UNITED STATES DEPARTMENT OF COMMERCE
Economics and Statistics Administration
U.S. Census Bureau
Washington, DC 20233-0001

May 14, 2003

Mr. Stephen H. Halkiotis
Chair, Board of County Commissioners
Orange County
P.O. Box 8181
Hillsborough, NC 27278

Dear Mr. Halkiotis:

The U.S. Census Bureau is currently conducting the Count Question Resolution (CQR) program. As noted in the enclosed brochure, the CQR program comprises the procedures and guidelines for receiving, processing, and responding to questions regarding the officially released Census 2000 counts.

Under the CQR program, Census Bureau staff initiated an internal review of census files. Our research found an error in the geographic assignment of group quarters in various blocks within the town of Chapel Hill. In addition, we identified housing units that were erroneously included in Census 2000 due to processing errors.

These errors affect Orange County and town of Chapel Hill. Consequently, Orange County will soon receive a Certification Letter from the Director of the Census Bureau stating Orange County's housing unit and associated population counts.

If you have additional questions, please have a member of your staff contact Mr. Robert Rinaldi, Assistant Division Chief, Decennial Management Division, at 1-866-546-0527.

Sincerely,

Teresa Angueira
Chief, Decennial Management Division

Enclosure

UNITED STATES DEPARTMENT OF COMMERCE
Economics and Statistics Administration
U.S. Census Bureau
Washington, DC 20233-00001

May 14, 2003

The Honorable Rosemary Waldorf
Mayor of Chapel Hill
306 N. Columbia Street
Chapel Hill, NC 27516

Dear Mayor Waldorf:

The U.S. Census Bureau is currently conducting the Count Question Resolution (CQR) program. As noted in the enclosed brochure, the CQR program comprises the procedures and guidelines for receiving, processing, and responding to questions regarding the officially released Census 2000 counts.

Under the CQR program, Census Bureau staff initiated an internal review of census files. Our research found an error in the geographic assignment of group quarters in various blocks within the town of Chapel Hill. In addition, we identified housing units that were erroneously included in Census 2000 due to processing errors.

These errors affect Orange County and town of Chapel Hill. Consequently, Orange County will soon

receive a Certification Letter from the Director of the Census Bureau stating Orange County's housing unit and associated population counts.

If you have additional questions, please have a member of your staff contact Mr. Robert Rinaldi, Assistant Division Chief, Decennial Management Division, at 1-866-546-0527.

Sincerely,

Teresa Angueira
Chief, Decennial Management Division

Enclosure

Appendix H

UNITED STATES DEPARTMENT OF COMMERCE
Economics and Statistics Administration
U.S. Census Bureau
Washington, DC 20233-00001
OFFICE OF THE DIRECTOR

Oct. 06, 2003

Mr. Terrence Sullivan
Director of Research
North Carolina General Assembly
LOB, Room 545
Raleigh, NC 27603

Dear Mr. Sullivan:

At the most recent summer meeting of the NCSL's Redistricting Task Force, representatives from the states requested that our office provide copies of the certification letters issuing the revised census counts resulting from the Count Question Resolution Program. The Census Bureau currently is sending these letters to the respective communities. These letters are issued as each count question results in a change to the official count for a governmental entity such as a city, county or minor civil division. I am enclosing a copy of the letter recently sent to a governmental entity in your state.

If you would prefer not to receive copies of these letters please let me know. The information also is available via our American FactFinder located at http://factfinder.census.gov.
Please make a note, this program will expire September 30, 2003. If I can be of further assistance, please call on (301) 763-4039.

Sincerely,

Cathy McCully, Chief
Census Redistricting Date Office

Enclosures

cc: Bill Gilkeson, Legislative Services
Daniel Frey, GIS Programmer/Analyst
Gerry F. Cohen, Director of Bill Drafting
Legislative Services Office

UNITED STATES DEPARTMENT OF COMMERCE
Economics and Statistics Administration
U.S. Census Bureau
Washington, DC 20233-0001
OFFICE OF THE DIRECTOR

September 30, 2003

FROM THE DIRECTOR
U.S. CENSUS BUREAU

This is an official statement of the revised Census 2000 population and housing unit counts for Orange County, North Carolina, including corrections made through September 30, 2003.

According to the official returns of the TWENTY-SECOND DECENNIAL CENSUS OF THE UNITED STATES, on file in the U.S. Census Bureau, the counts as of April 1, 2000, for Orange County, North Carolina, are:

Population	115,531
Housing Units	47,706

Sincerely,

Charles Louis Kincannon

This statement is being sent to the highest elected official of this governmental unit, the Secretary of State, and other state officials.

Census counts used for Congressional apportionment and legislative redistricting and the Census 2000 data products will remain unchanged. The Census Bureau will include the corrections in the errata information to be made available via the Internet on the *American FactFinder* system and used specifically to modify the decennial census file for use in yearly postcensal estimates beginning in December 2002.

Details regarding the Census Bureau's calculation of these figures are attached. If you require additional information, please call the Census Bureau's Count Question Resolution program staff, on 1 (301) 763-4444.

USCENSUSBUREAU

BEST AVAILABLE COPY

Area Name	Original Tabulation Counts		Corrected Count		Change	
	Total Housing Units	Total Population	Total Housing Units	Total Population	Total Housing Units	Total Population
Orange County	49,289	118,227	47,706	115,531	-1583	-2696
* Population counts include population from housing units and group quarters, where applicable.						

100

(3)

No. 07-1458

FILED
JUL 23 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the

Supreme Court of the United States

JOSEPH DEAN, *ET AL.*,

Appellants,

v.

LARRY LEAKE, *ET AL.*,

Appellees,

and

NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP,

Appellee-Intervenor.

On Appeal from the United States District Court for the Eastern District of North Carolina

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM

ROY COOPER
Attorney General
State of North Carolina
Christopher G. Browning, Jr.
Alexander McC. Peters*
Tiare B. Smiley
North Carolina Department of Justice
Post Office Box 629
Raleigh, N.C. 27602
(919) 716-6900

July 2008

* Counsel of Record

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction over the present appeal because appellants' notice of appeal was untimely filed.

2. Whether this appeal will be moot before it can be decided.

3. Whether this appeal is an improper attempt to have the merits of the case decided rather than to have a denial of a preliminary injunction reviewed.

4. Whether the court below abused its discretion by determining that appellants were not likely to prevail on the merits of their claim.

TABLE OF CONTENTS

COUNTER-STATEMENT OF QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINION BELOW 2

JURISDICTION 2

STATEMENT 2

A. Factual Background 2

B. Procedural Background 7

ARGUMENT 10

I. THE NOTICE OF APPEAL WAS NOT TIMELY 10

II. THIS APPEAL WILL BE MOOT BEFORE IT CAN BE DECIDED 14

III. THE QUESTIONS ARE NOT SUBSTANTIAL 16

A. Appellants Are Asking this Court to Decide the Merits of Their Claims Before the Trial Court Has Considered the Merits 16

B. The General Assembly of North Carolina Was Not Required to Use Corrected Census Data in its 2003 Legislative Redistricting 20

C. Appellants Failed to Offer Any Forecast of Evidence That the General Assembly of North Carolina Did Not Act in Good Faith When it Enacted the Current Legislative Districting Plans 24

CONCLUSION 25

APPENDIX:

Order denying preliminary injunction, filed 01/28/2008 . . . . . App. 1

TABLE OF AUTHORITIES

CASES

Alabama v. United States,
279 U.S. 229 (1929) 18

Bartlett v. Strickland,
128 S. Ct. 1648 (2008) 7, 9, 16

Blanchard v. Commonwealth Oil Co.,
294 F.2d 834 (5th Cir. 1961) 12

Carnes v. United States,
279 F.2d 378 (10th Cir.),
cert. denied, 364 U.S. 846 (1960) 12

Catlin v. United States, 324 U.S. 229 (1945) 12

Davis v. FEC, 128 S. Ct. 2759,
2008 U.S. LEXIS 5267, *17 (2008) 15

Direx Israel, Ltd. v. Breakthrough Medical Corp.,
952 F.2d 802 (4th Cir. 1991) 17

Giovani Carandola, Ltd. v. Bason,
303 F.3d 507 (4th Cir. 2002) 17

Karcher v. Daggett, 462 U.S.725 (1983) 23

Kirkpatrick v. Preisler, 394 U.S. 526 (1969) 22

Munaf v. Geren, 128 S. Ct. 2207 (2008) 17

Pender County v. Bartlett,
649 S.E.2d 364 (2007), *cert. granted*,
128 S. Ct. 1648 (N.C. 2008) 6, 7

Riley v. Kennedy, 128 S. Ct. 1970 (2008) 12

Stephenson v. Bartlett (Stephenson I),
562 S.E.2d 377 (N.C. 2002) 3, 6

Stephenson v. Bartlett (Stephenson II),
582 S.E.2d 247 (N.C. 2003) 3, 6

Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986), *overruled on other grounds by Planned Parenthood of Southeastern Pa. v. Casey*,
505 U.S. 833 (1992) 19

United Fuel Gas Co. v. Pub. Serv. Comm'n of W. Va., 278 U.S. 322 (1929) 18

United States v. F. & M. Schaefer Brewing Co.,
356 U.S. 227 (1958) 12, 13

United States v. Hark,
320 U.S. 531 (1944) 12, 13

Univ. of Texas v. Camenisch,
451 U.S. 390 (1981) 16

STATUTES

13 U.S.C. § 141(c) 3

28 U.S.C. § 1253 ..... 2, 11

28 U.S.C. § 2101(b) 2, 11

28 U.S.C. § 2284 7

N.C. GEN. STAT. § 163-1(b) 13

N.C. GEN. STAT. § 163-106(c) 13

2003 N.C. Sess. Laws
(Extra Session) 434, §§ 1-4, 12 3

INTERNET SOURCES

The Census 2000 Count Question Resolution
Program, 66 Fed. Reg. 35,588 (2001), http://-
www.census.gov/dmd/www/cqrfsheet.htm ... 5

United States Census Bureau, *Strength in Numbers: Your Guide to Census 2000 Redistricting Data from the U.S. Census Bureau* (July 2000), http://www.census.gov-/rdo/pdf/strenghth2.pdf 6

United States Census Bureau, *Count Question Resolution (CQR) Fact Sheet* (May 2001), http://-www.census.gov/dmd/www/cqrfsheet.htm 4

No. 07-1458

In the

Supreme Court of the United States

JOSEPH DEAN, *ET AL.*,

Appellants,

v.

LARRY LEAKE, *ET AL.*,

Appellees,

and

NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP,

Appellee-Intervenor.

On Appeal from the United States District Court for the Eastern District of North Carolina

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM

Pursuant to Rule 18.6 of the Rules of the Supreme Court of the United States, Appellees Larry Leake, *et al.*, move that this Court dismiss this appeal on the grounds that it is untimely, that it will be moot by the time it is heard and decided, and that the questions raised by the appeal are so insubstantial as to require no further argument. In the alternative, appellees move that this Court summarily affirm the Order of the three-judge United States District Court for the Eastern District of North Carolina, dated January 28, 2008.

OPINION BELOW

The Order of the three-judge United States District Court for the Eastern District of North Carolina, dated January 28, 2008, denying appellants' motion for preliminary injunction, which was not included in appellants' Jurisdictional Statement, is reprinted at pages App. 1 to App. 4 of this Motion to Dismiss or, in the Alternative, to Affirm ("M.D. App.").

JURISDICTION

The three-judge panel of the United States District Court for the Eastern District of North Carolina denied appellants' Motion for Preliminary Injunction on January 28, 2008. (M.D. App. 1- 4) Pursuant to 28 U.S.C. § 2101(b), appellants filed an untimely Notice of Appeal on March 20, 2008. Appellants invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1253.

STATEMENT

A. Factual Background

Plaintiffs challenge the current districting plans for the North Carolina Senate and the North Carolina House of Representatives, adopted on November 25,

2003.[1] *See* 2003 N.C. Sess. Laws (Extra Session) 434, §§ 1-4, 12. The 2003 plans were used for the 2004 and 2006 general elections. After denial of appellants' motion for preliminary injunctive relief, the 2008 primary was held using the 2003 plans. Like the two earlier plans, the 2003 districting plans were constructed using the official census numbers (P.L. 94-171 data) provided by the United States Census Bureau to North Carolina for redistricting purposes.[2]

Following the completion of the 2000 Census, the Census Bureau began its post-census Count Question Resolution Program ("CQR"), whereby state and local

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[1] The 2003 redistricting plan was the third statewide redistricting plan adopted by the General Assembly following the 2000 decennial census. The first two redistricting plans were struck by the North Carolina Supreme Court on the ground that they violated provisions of the North Carolina Constitution that prohibit dividing counties to form state House and Senate districts (the "whole county" provisions). *Stephenson v. Bartlett* (*Stephenson I*), 562 S.E.2d 377 (N.C. 2002); *Stephenson v. Bartlett* (*Stephenson II*), 582 S.E.2d 247 (N.C. 2003).

[2] Pursuant to 13 U.S.C. § 141(c), the Secretary of Commerce is required to complete, report and transmit the decennial census to the States within one year after the decennial census date, or in this case, one year after April 1, 2000. The P.L. 94-171 data is the decennial census provided to North Carolina in 2001.

governments could question and seek resolution of perceived errors in the Census. Specifically, the CQR provided a mechanism to challenge counts of housing units and group quarters (*e.g.*, college dormitories, nursing homes or military barracks) populations. According to the Census Bureau,

> [t]he CQR Program is a planned administrative review program that will handle external challenges to particular official Census 2000 counts of housing units and group quarters population received from state, local or tribal officials of governmental entities or their designated representatives in the U.S. and Puerto Rico. The CQR program is not intended to create a mechanism or process to challenge the March 6, 2001, decision of the Secretary of Commerce to release unadjusted Census 2000 redistricting data. No changes will be made to the apportionment or redistricting counts as a result of this program.

United States Census Bureau, *Count Question Resolution (CQR) Fact Sheet* (May 2001), http://-www.census.gov/dmd/www/cqrfsheet.htm. This data, however, only revised housing unit and group quarters population counts; it did not provide any other level of detail, including voting age population or race and ethnicity. The CQR program data were not meant to

be used for redistricting, nor was the data set complete enough to be used for that purpose. "The Census Bureau will not change the apportionment or redistricting counts to reflect corrections resulting from the CQR process. In accordance with the law, apportionment counts were delivered to the President on December 28, 2000, and the counts required for redistricting were delivered to the states by April 1, 2001." The Census 2000 Count Question Resolution Program, 66 Fed. Reg. 35,588 (2001).

The CQR resulted in a series of letters with corrections for 28 counties and 88 municipalities being sent to officials in North Carolina over a period of time beginning September 13, 2001 (Polkton, Anson County), and ending on January 8, 2004 (New Bern and Trent Woods, Craven County). The largest of these corrections was sent to Orange County officials on September 30, 2003, informing them of a downward correction of 2,696 persons based on errors in the geographic assignments of group quarters and of housing units. (J.S. App. 10-11) The Census Bureau released final corrected numbers based on its CQR on June 10, 2004; it was only at this stage that the CQR population data was provided to the states at the block level,[3] and the data did not include information as to

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[3] A census block is the smallest geographic entity for which the Census Bureau collects and tabulates all decennial census data, including race, ethnicity and

the racial make-up or the voting-age population of the census blocks in question. (J.S. App. 11)

Prior to the initiation of this action in November 2007, the only challenge to the current plans was an action challenging the formation of House District 18 in Pender and New Hanover counties on the grounds that the district was not necessary to comply with the provisions of § 2 of the Voting Rights Act and therefore unnecessarily crossed county lines in violation of the North Carolina Supreme Court's decisions in *Stephenson v. Bartlett* (*Stephenson I*), 562 S.E.2d 377 (N.C. 2002), and *Stephenson v. Bartlett* (*Stephenson II*), 582 S.E.2d 247 (N.C. 2003). *See Pender County v. Bartlett*, 649 S.E.2d 364 (2007), *cert. granted*, 128 S. Ct. 1648 (2008). The North Carolina Supreme Court held that a minority group is only protected by § 2 if that group constitutes a numerical majority of a proposed district. Consequently, the North Carolina Supreme Court proceeded to hold that the current configuration of District 18 was not required in order

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voting age; blocks average about 100 persons each. United States Census Bureau, *Strength in Numbers: Your Guide to Census 2000 Redistricting Data from the U.S. Census Bureau* 8-9 (July 2000), http://www.census.gov-/rdo/pdf/strenghth2.pdf. As appellants conceded below, "block level census data . . . is the level of data necessary to calculate accurately district deviations." (Docket No. 6, Pls. Mem. Supp. Prelim. Inj. at 15)

to comply with § 2. The court, in its August 24, 2007, opinion, directed that District 18 and "other impacted districts" must be redrawn, but it stayed that directive until after the 2008 general election to avoid disruption of the 2008 election cycle. *Pender County*, 649 S.E.2d at 376. On March 17, 2008, this Court granted the petition for writ of certiorari filed by the state defendants in that action. *See Bartlett v. Strickland*, 128 S. Ct. 1643 (2008).

B. Procedural Background

Appellants filed this action challenging the constitutionality of the current districting plan for the North Carolina General Assembly on November 21, 2007; the Complaint also sought the appointment of a three-judge panel pursuant to 28 U.S.C. § 2284. (Docket No. 1) On the same date, appellants filed a Motion for Preliminary Injunction. (Docket No. 4)

On December 7, 2007, the Honorable Karen J. Williams, Chief Judge of the United States Court of Appeals for the Fourth Circuit, convened a three-judge court for the United States District Court for the Eastern District of North Carolina and designated the following as the members of the three-judge panel: The Honorable Allyson K. Duncan, Judge of the United States Court of Appeals for the Fourth Circuit; the Honorable Louise W. Flanagan, Chief Judge of the United States District Court for the Eastern District of

North Carolina; and the Honorable Robert J. Conrad, Jr., Chief Judge of the United States District Court for the Western District of North Carolina. (Docket No. 28) On December 18, 2008, the North Carolina State Conference of Branches of the NAACP moved to intervene in this action as defendants. That motion was granted by the district court on January 4, 2008. (Docket No. 47)

On January 25, 2008, the three-judge court heard appellants' Motion for Preliminary Injunction. Appellants, in both their written and oral arguments in support of their motion, focused exclusively on their first claim for relief: that use of North Carolina's current districting plans should be enjoined for the 2008 election because those plans fail to comply with the requirements of one person, one vote in that they are based on the P.L. 94-171 data rather than on the CQR correction letters released up to the time the plans were enacted. Using the CQR data would make the overall range of deviation among districts exceed ten percent, whereas under the P.L. 94-171 data the overall range of deviation is less than ten percent.

On January 28, 2008, the three-judge court filed an Order denying, *inter alia*, appellants' Motion for Preliminary Injunction. (M.D. App. 1- 4) The three-judge court specifically noted that its findings and conclusions would be set forth in a separate memorandum opinion. (M.D. App. 3) On March 17,

2008, the three-judge court entered its Memorandum Opinion, authored by Judge Conrad, explaining why it had denied the Motion for Preliminary Injunction in its January 28 Order. (J.S. App. 1-26)

Appellants filed their Notice of Appeal on March 20, 2008. (J.S. App. 27-29) They did not apply to this Court for emergency relief so as to prevent the use of the current districting plans in the 2008 election.

This action remains pending in the district court. Upon the grant of certiorari by this Court in *Bartlett*, the three-judge panel issued an order holding all proceedings in this action in abeyance pending final resolution of *Bartlett* and disposition of this appeal.[4] (Docket No. 70)

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[4] This action and *Bartlett* involve the same House districting plan, and proceedings in this action have been held in abeyance by the three-judge court pending final resolution of *Bartlett* because one of appellants' causes of actions is predicated upon the viability of the decision of the North Carolina Supreme Court being reviewed in *Bartlett*. Appellants' representation, however, that this case is a "companion case" of *Bartlett* is simply not accurate. (J.S. 11)

ARGUMENT

This appeal of the denial of preliminary injunctive relief should be dismissed or the Order below affirmed for four independent reasons. First, this Court lacks jurisdiction over the appeal because appellants' notice of appeal was untimely filed. Second, this appeal will be moot by the time it can be decided. Third, this appeal is an improper attempt to have the merits of the case decided rather than to have a denial of a preliminary injunction reviewed. And fourth, the court below did not abuse its discretion by determining that appellants were not likely to prevail on the merits of their claim. Each of these provides ample reason to dismiss the appeal or affirm the decision below.

I. THE NOTICE OF APPEAL WAS NOT TIMELY

Appellants appeal only the three-judge court's denial of their motion for preliminary injunction. Contrary to the representation made by appellants (J.S. 2), no judgment has been entered in this matter or appears on the docket. The Order denying appellants' Motion for Preliminary Injunction was entered on January 28, 2008. In that Order, the court specifically noted: "The court will set forth it findings and conclusions in separate memorandum opinion." (M.D. App. 3)

Indeed, the three-judge court filed a separate Memorandum Opinion on March 17, 2008. That Memorandum Opinion begins as follows:

> This matter comes before the three-judge Court on Plaintiffs' Motion for a Preliminary Injunction. Due to the proximity of the candidates filing for the 2008 election, we issued an order without accompanying memorandum following the January 25 hearing, denying equitable relief. We now explain our reasoning.

(J.S. App. 1 (footnote omitted)) It was the January 28 Order, then, that effected the denial of the preliminary injunction sought by appellants; the March 17 Memorandum Opinion served only to explain *why* the preliminary injunction had been denied.

A party may appeal to this Court from an order of a three-judge court denying interlocutory injunctive relief. 28 U.S.C. § 1253. Such an appeal "shall be taken within thirty days from the judgment, order or decree, appealed from." 28 U.S.C. § 2101(b). Appellants filed their Notice of Appeal on March 20, 2008, more than thirty days after the entry of the January 28 Order denying preliminary injunctive relief. Appellants' appeal can only be timely, then, if the thirty days for appeal began to run not with the Order denying the motion for preliminary injunction,

but with the later opinion stating why injunctive relief had earlier been denied. In this case, the time for appeal began to run with the filing of the January 28 Order.

Those cases that have considered which of two judicial filings constitutes the final decision from which appeal can be made have uniformly looked to the intent of the trial court; that is, they have asked which order or opinion did the court intend to be the final judicial act in the matter. *See, e.g., Riley v. Kennedy*, 128 S. Ct. 1970, 1980-81 (2008); *Catlin v. United States*, 324 U.S. 229, 233 (1945). *Accord Blanchard v. Commonwealth Oil Co.*, 294 F.2d 834, 836-37 (5th Cir. 1961); *Carnes v. United States*, 279 F.2d 378 (10th Cir.), *cert. denied*, 364 U.S. 846 (1960). Specifically considering a situation where a district court filed and docketed its opinion granting a motion for summary judgment more than two months before a formal judgment was entered and docketed, this Court stated: "While an opinion may embody a final decision, the question whether it does so depends upon whether the judge has or has not clearly declared his intention in this respect in his opinion." *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 232 (1958). The Court went on to reject the argument that the time for appeal began to run with the entry of the judgment rather than the earlier opinion, stating: "'Where, as here, a formal judgment is signed by the judge, this is *prima facie* the decision or judgment

rather than a statement in an opinion or a docket entry. . . . The judge was conscious, as we are, that he was without power to extend the time for appeal.'" *Id.* at 235 (quoting *United States v. Hark*, 320 U.S. 531, 534-535 (1944)).

In this case, appellants sought a preliminary injunction enjoining the use of North Carolina's current legislative districting plans for the 2008 election and requiring the creation of new plans for that election. The three-judge court entered its order denying that injunctive relief on Monday, January 28, 2008, just days after its hearing on the motion. The three-judge court was aware that, pursuant to N.C. GEN. STAT. §§ 163-1(b) and -106(c), persons seeking their party's nomination for seats in the North Carolina General Assembly were required to file their notices of candidacy between February 11 and February 29, 2008, in preparation for the May 6 primary. It was vital, therefore, that the three-judge court resolve any uncertainty and settle the question of whether the current districting plan could be used for the 2008 election as quickly as possible; as reflected in their later Memorandum Opinion, the three-judge court acted expeditiously because of "the proximity of the candidates filing for the 2008 election." (J.S. App. 1)

The three-judge panel undoubtedly also understood that any appeal from their order denying

preliminary injunctive relief would have to be undertaken as quickly as possible since the election process was poised to begin. Thus, the three-judge court intended for the January 28 Order to be their final judicial act with regard to the motion for preliminary injunction; the March 17 Memorandum Opinion, by its express terms, served only to explain why the motion had been denied on January 28.

Because appellants failed to file their notice of appeal within thirty days of entry of the three-judge court's January 28 Order denying their request for preliminary injunctive relief, their appeal is not timely and must be dismissed.

II. THIS APPEAL WILL BE MOOT BEFORE IT CAN BE DECIDED

Appellants have appealed from the three-judge court's denial of their Motion for Preliminary Injunction, which sought to prohibit the State of North Carolina from using its current legislative districting plans for the 2008 election. Appellants did not seek any injunctive relief from this Court pending their appeal. Accordingly, primaries were conducted on May 6, and the 2008 election for the 170 members of the North Carolina General Assembly is proceeding using the plans that appellants sought to enjoin. By the time this appeal can be heard and decided, the 2008 general election will, in the usual course of

events, be over and the relief sought to be achieved by the preliminary injunction will be unattainable. Appellants' appeal, therefore, is certain to become moot while pending before this Court.

The harm claimed by appellants here – the conduct of the 2008 election for members of the North Carolina General Assembly under plans they claim are unconstitutional – cannot be redressed by a favorable ruling by this Court because the 2008 election process will have been completed. Because any decision of this Court will not provide relief for the harm they allege, this appeal is moot. *Cf. Davis v. FEC*, 128 S. Ct. 2759, 2008 U.S. LEXIS 5267, *17 (2008) (considering issues of standing) ("To qualify for standing, a claimant must present an injury that is . . . likely to be redressed by a favorable ruling.").

Appellants claim that the decision of the three-judge court denying preliminary injunctive relief "effectively determined the outcome" of their claims on the merits. (J.S. 3) To the contrary, the court below has not determined the merits of their claims "effectively" or otherwise. All that the three-judge court has decided is that appellants failed to meet their burden for obtaining preliminary injunctive relief. Given the stages that still remain in this appeal – briefing, oral argument and decision – no decision by this Court will redress the harm alleged by appellants in this appeal because the 2008 election will already be

over.[5] *Cf. Univ. of Texas v. Camenisch*, 451 U.S. 390, 398 (1981) (where "the terms of the injunction . . . have been fully and irrevocably carried out" prior to the appeal being heard, any question as to whether the preliminary injunction should have been granted becomes moot). Accordingly, this appeal should be dismissed as moot.

III. THE QUESTIONS ARE NOT SUBSTANTIAL

A. Appellants Are Asking this Court to Decide the Merits of Their Claims Before the Trial Court Has Considered the Merits

Appellants have appealed the denial of their Motion for Preliminary Injunction. In arguing that motion, appellants focused exclusively on their claim that North Carolina's current legislative districting plans enacted in 2003 violate one person, one vote principles because the State did not rely on then-incomplete post-census adjustments to 2000 census data. (J.S. App. 3) Under the post-census adjustments the overall deviation among districts in both the Senate and House plans would exceed ten percent;

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[5] *Bartlett* will have been decided, and proceedings in this case will have resumed, in time for action to be taken, if necessary, prior to the 2010 election.

under the uncorrected P.L. 94-171 data, the overall deviation is less than 10 percent. (J.S. App. 4, 6, 15, 23 (nn. 6-7))

"A preliminary injunction is an extraordinary and drastic remedy; it is never awarded as of right." *Munaf v. Geren*, 128 S. Ct. 2207, 2219 (2008) (internal quotation marks and citations omitted). The three-judge court weighed the motion using the standard set forth by the United States Court of Appeals for the Fourth Circuit. (J.S. App. 13) Under that standard, the court considered and balanced "(1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied, (2) the likelihood of harm to the defendant if the requested relief is granted, (3) the likelihood that the plaintiff will succeed on the merits, and (4) the public interest." *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 812 (4th Cir. 1991). As the court below noted, while generally the harms to the parties are balanced before any consideration of likelihood of success on the merits, "when the harm alleged by the plaintiff is the deprivation of a constitutional right, the likelihood of success on the merits is so 'inseparably linked' to the proving of an actual harm that the court may proceed directly to consider the merits of the plaintiff's action." (J.S. App. 14, (citing *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 511 (4th Cir. 2002))) Applying this standard, the three-judge panel determined that appellants were not likely to succeed on the merits of

establishing a violation of the one person, one vote principle.

This Court has set forth the standard of review for considering an appeal from the granting or denial of preliminary injunctive relief. "[A]n application for an interlocutory injunction is addressed to the sound discretion of the trial court; and that an order either granting or denying such an injunction will not be disturbed by an appellate court unless the discretion was improvidently exercised." *Alabama v. United States*, 279 U.S. 229, 231 (1929). This principle applies equally to appeals from three-judge courts as to appeals from single judges. "The duty of this Court, therefore, upon an appeal from such an order, at least generally, is not to decide the merits but simply to determine whether the discretion of the court below has been abused." *Id.* Indeed, "[a]n order of a court of three judges denying an interlocutory injunction will not be disturbed on appeal unless plainly the result of an improvident exercise of judicial discretion." *United Fuel Gas Co. v. Public Service Comm'n*, 278 U.S. 322, 326 (1929).

It is notable that appellants nowhere in their Jurisdictional Statement reference this standard of review, nor do they make even the slightest attempt to demonstrate how the three-judge court below abused its discretion in denying preliminary injunctive relief.

Coupled with the lack of any sense of urgency displayed by appellants' failure to seek emergency injunctive relief from this Court pending appeal, the failure to argue in any way about how the court below abused its discretion shows that appellants' real concern is not the denial of a preliminary injunction that would have prevented the use of North Carolina's current districting plans in the 2008 election. Rather, appellants are attempting to use this appeal as a vehicle for having this Court bypass the evidentiary phase of the trial process to consider the merits of this action and establish the law of the case. This is also made evident in the conclusion to the Jurisdictional Statement, which essentially asks this Court to instruct the court below to use "the most accurate enumerated census data available to the state North Carolina [sic]" in deciding appellants' claims.

This Court has stated, of course, that "if a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 757 (1986), *overruled on other grounds by Planned Parenthood v. Casey*, 505 U.S. 833 (1992). This exception to the general standard does not apply here, however, at least not in a way that would provide any relief to appellants. The three-judge panel considered

two specific arguments raised by appellants: whether the North Carolina General Assembly had a duty to use corrected census data and whether the North Carolina General Assembly acted without good faith in enacting the current districting plans. When the standards noted above are applied to the decision of the three-judge court, it is apparent not only that there was no abuse of discretion, but also that the court's application of the law was correct.

B. The General Assembly of North Carolina Was Not Required to Use Corrected Census Data in its 2003 Legislative Redistricting

Appellants argued below, as they do before this Court, that the North Carolina General Assembly was required to use corrected census data that had been partially issued by the United States Census Bureau when it enacted new legislative districting plans in November, 2003. The three-judge court rejected this argument, finding instead that under the relevant case law, "the General Assembly is permitted, but not required, to use the corrected census data." (J.S. App. 16) The opinion of the three-judge court interpreting and applying the case law (J.S. App. 16-18) is well-reasoned and demonstrates why the court believed that appellants were not likely to prevail on the merits of their one person, one vote claim.

In their arguments below, as in their Jurisdictional Statement, appellants focus almost exclusively on the corrected census data issued with respect to Orange County, North Carolina. While the correction for Orange County was the largest correction issued for North Carolina, it was not the only correction issued. As noted by the three-judge panel, many other corrections were released concerning other counties and municipalities,[6] and the CQR program was not completed and final data, including block level data, was not released until June 10, 2004 – more than six months after the enactment of the current legislative districting plan. (J.S. App. 11) The three-judge court also noted that the final data "do not indicate how the racial makeup of the blocks was affected by the corrections" and that the "corrected data carried a disclaimer that it was not to be used for redistricting purposes: 'Census counts used for Congressional apportionment and legislative redistricting . . . remain unchanged.'" (J.S. App. 11)

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[6] Lists of the 28 counties and 88 municipalities in North Carolina that received correction letters, including the dates of the letters and the count changes, can be found at http://www.osbm.state.nc.us-/demog/censcorc.html and at http://www.osbm.state.-nc.us/demog/censcorr.html. These were attached as Exhibits 5 and 6 to appellees' Memorandum in Opposition to Motion for Preliminary Injunction. (Docket No. 41)

The three-judge court concluded that "the General Assembly is permitted, but not required, to use the corrected census data." (J.S. App. 16) One observation made by the court below is particularly salient. The court cited to *Kirkpatrick v. Preisler*, where this Court held that:

> [s]ituations may arise where substantial population shifts [between censuses] can be anticipated. Where these shifts can be predicted with a high degree of accuracy, States that are redistricting *may* properly consider them. By this we mean to open no avenue for subterfuge. Findings as to population trends must be thoroughly documented and applied throughout the State in a systematic, not an *ad hoc*, manner.

Kirkpatrick v. Preisler, 394 U.S. 526, 535 (1969) (emphasis added); *see also* J.S. App. 17. Here, of course, the reliance on the corrected census data for Orange County urged by appellants would unquestionably have been *ad hoc*. There would have been no way, based on the incomplete CQR data that had been received when the General Assembly enacted the current districting plan, to apply the corrected data in a systematic manner throughout the State. Indeed, it would have been problematic even after the release of the final CQR data, since that data did not have other information necessary for redistricting, including

how the corrections affected racial makeup or voting age populations of the implicated census blocks.

The North Carolina General Assembly simply could not be required to rely on data not yet available and not thorough enough to provide the necessary information for redistricting. This is especially so, the three-judge court held, in light of "the fact that states conducting redistricting years after the decennial census are operating under a legal fiction. Those circumstances, as well as the inherently legislative nature of the redistricting function, support the granting of deference to the judgment of the General Assembly in deciding which data to use." (J.S. App. 18 (internal citations omitted)) *See also Karcher v. Daggett*, 462 U.S. 725, 732 (1983) ("Any standard, including absolute equality, involves a certain artificiality. As appellants point out, even the census data are not perfect, and the well-known restlessness of the American people means that population counts for particular localities are outdated long before they are completed.").[7] The three-judge panel did not abuse its discretion in determining that this Court's "cases

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[7] The dramatic population increases between 2000 and 2006 in some North Carolina counties and dramatic decreases in others, ranging from 41.61% growth (Union County) to 8.32% decline (Hyde County) were presented to the three-judge court through Exhibit 7 to appellees' Memorandum in Opposition to Motion for Preliminary Injunction. (Docket No. 41)

use permissive, not mandatory language when referring to the use of corrected census data." (J.S. App. 18) Likewise, it did not abuse its discretion by denying appellants' request for preliminary injunctive relief.

C. Appellants Failed to Offer Any Forecast of Evidence That the General Assembly of North Carolina Did Not Act in Good Faith When it Enacted the Current Legislative Districting Plans

Appellants argued below, again as they do to this Court, that the leadership of the North Carolina House of Representatives somehow acted to ensure that the General Assembly as a whole and the public were unaware of the corrected census data. (*See, e.g.*, J.S. 20-21, 28) These broad allegations carry no more weight now than they did before the three-judge panel, which called them "vague allegations of a conspiracy" for which appellants "offered little more than conclusory allegations of a conspiracy."[8] (J.S. App. 19-20)

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[8] These "vague allegations of a conspiracy" of silence are particularly unsubstantiated considering that the Census Bureau's correction letters were sent to numerous local governmental officials and that the Orange County errors were widely reported in the news media.

As the three-judge court concluded, appellants completely failed to offer any forecast of actual evidence, as opposed to "conclusory allegations," that any such conspiracy existed or that any legislative leaders acted in bad faith. In the absence of any forecast or evidence of bad faith, the three-judge court appropriately determined that appellants had not demonstrated that they were likely to succeed on the merits of a claim of bad faith. There simply can be no argument that the three-judge panel abused its discretion in making this determination, and the preliminary injunction was properly denied.

CONCLUSION

For these reasons, the motion to dismiss, or in the alternative, to affirm should be granted.

Respectfully submitted,

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July 2008

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION

No. 2:07-CV-00051-FL-AD-RC

JOSEPH DEAN, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**ORDER**
	)	
LARRY LEAKE, in his official capacity as Chairman of the North Carolina State Board of Elections, *et al.*,	)	
	)	
Defendants.	)	
	)	

Before Allyson K. Duncan, United States Circuit Judge, Fourth Circuit; Robert J. Conrad, Jr., Chief United States District Judge for the Western District of North Carolina; and Louise W. Flanagan, Chief United States District Judge for the Eastern District of North Carolina, sitting by designation as a three-judge District Court

This matter, raising questions of federal and state law in the context of electoral apportionment in the North Carolina state elections process, came before the court January 25, 2008, for hearing on plaintiffs' motion for preliminary injunction and defendants' motion to hold in abeyance any consideration of the merits of the action, including any responsibility of defendants to answer or otherwise respond to the complaint until final disposition of a petition for *writ of certiorari* filed with the United States Supreme Court in Bartlett v. Strickland 76 U.S.L.W. 3289 (U.S. Nov. 21, 2007) (No. 07-689), seeking review of decision of the North Carolina Supreme Court in Pender County v. Bartlett, 361 N.C. 491, 649 S.E.2d 364 (2007).

The motion to hold in abeyance necessarily implicates the court's consideration of the motion for preliminary injunction. Accordingly, the court disposes of the latter filed motion first. Defendants acknowledge several of plaintiffs' claims do not rely on the decision in Pender County. The motion for injunctive relief focuses upon those allegations involving dilution of one person one vote and use of incorrect census data. Judicial economy and the public interest do not, as urged by defendants, favor withholding consideration of the issues raised on motion for preliminary injunction until resolution of Pender County. The court, in its discretion, DENIES

defendants' motion without prejudice to its right to refile should the Supreme Court grant the petition for certiorari. Defendants shall have twenty (20) days from date of entry of this order to answer or otherwise respond to the complaint.

Turning now to the motion for preliminary injunction, where "preliminary injunctions are extraordinary remedies involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances," Microstrategy Inc. v. Motorola, Inc., 245 F.3d 335, 339 (4th Cir. 2001) (quoting Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 816 (4th Cir. 1992)), in its discretion, the court finds plaintiffs have not satisfied the weighty burdens upon them. The court will set forth its findings and conclusions in separate memorandum opinion. Accordingly, plaintiffs' motion for preliminary injunction is DENIED.

Where defendants shall have twenty (20) days from date of entry of this order to answer or otherwise respond to the complaint, pursuant to Federal Rule of Civil Procedure 26(f), the parties shall prepare a joint report and plan to be submitted to the court no later than March 10, 2008. Upon its receipt and review, the court shall enter a scheduling order in accordance with Federal Rule of Civil Procedure 16(b), the Local Civil Rules, EDNC, and the court's regular administrative

procedures. If either party desires conference with the court prior to entry of the scheduling order, request may be made in the joint report and plan.

SO ORDERED, this 28th day of January, 2008.

FOR THE COURT:

/s/ Louise W. Flanagan
LOUISE W. FLANAGAN
Chief United States District Judge

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(2)

No. 07-1458

FILED
JUL 23 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

JOSEPH DEAN, ET AL.,
Appellants,

v.

LARRY LEAKE, ET AL.,
Appellees,

and

NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP
Appellee-Intervenor.

On Appeal from the United States District Court for the Eastern District of North Carolina

MOTION TO DISMISS OR AFFIRM FOR APPELLEE-INTERVENOR

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July 23, 2008

QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction over the present appeal because Appellants' notice of appeal was untimely filed.

2. Whether the district court abused its discretion when it denied Appellants' motion for a preliminary injunction after finding that substantial harm to the public interest would ensue if the motion were granted, and that North Carolina was not required to use corrected census data when it completed a court-ordered redistricting of the North Carolina General Assembly in 2003.

RULE 29.6 STATEMENT

The North Carolina State Conference of Branches of the NAACP is a § 503(c)(4) affiliate of the National Association for the Advancement of Colored People, Inc., which is a not-for-profit corporation organized under the laws of New York and does not issue shares to the public.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT 1

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. The Appeal is Untimely. 10

II. Reviewing or Reversing the District Court's Denial of Appellants' Preliminary Injunction Motion Is Unnecessary and Premature While *Bartlett v. Strickland* is Pending in this Court. 16

III. The District Court Did Not Abuse Its Discretion in Refusing to Grant the Motion for a Preliminary Injunction. 18

A. The District Court Did Not Abuse Its Discretion in Weighing the Interests. 18

B. North Carolina Was Not Required to Use Data Other than the Official P.L. 94-171 Data Provided by the Census Bureau When It Completed the 2003 Redistricting Process. 20

1. This Court Has Approved the Use of P.L. 94-171 Data for Mid-Decade Redistricting. 21

2. The Use of CQR Program Data Would Not Have Helped to Achieve Equality Among the Legislative Districts..... 25

C. Without Any Credible Evidence that the North Carolina General Assembly Acted in Bad Faith, the District Court Did Not Abuse Its Discretion in Denying the Preliminary Injunction. 29

CONCLUSION 31

APPENDIX

District Court Order (Jan. 28, 2008) 1a

Census Bureau Website Screenshot 4a

Census Bureau Website Text..... 6a

TABLE OF AUTHORITIES

CASES

Page

Abrams v. Johnson, 521 U.S. 74 (1997) 22, 24, 25

Ashcroft v. American Civil Liberties Union, 542 U.S. 656 (2004) 19

Bartlett v. Strickland, 128 S. Ct. 1648 (2008) (order granting writ of certiorari) 9, 10, 17

Bowles v. Russell, 127 S. Ct. 2360 (2007) 16

Brown v. Thomson, 462 U.S. 835 (1983) 21

Commissioner v. Bedford's Estate, 325 U.S. 283 (1945) 13

Connor v. Finch, 431 U.S. 407 (1977) 26

Daggett v. Kimmelman, 580 F. Supp. 1259 (D.N.J. 1984) 23

Department of Commerce v. U.S. House of Representatives, 525 U.S. 316 (1999) 27

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 19

FTC v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206 (1952) 14

Gaffney v. Cummings, 412 U.S. 735 (1973) 25

Georgia v. Ashcroft, 539 U.S. 461 (2003) 7, 23

Goldstein v. Cox, 396 U.S. 471 (1970) 11

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) 19, 20

Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982) 16

Karcher v. Daggett, 462 U.S. 725 (1983) ... 9, 23, 25, 29

Kirkpatrick v. Preisler, 394 U.S. 526 (1969) 27

LULAC v. Perry, 126 S. Ct. 2594 (2006) 22, 23, 24

Lopez v. Monterey County, 525 U.S. 266 (1999) 29

Mahan v. Howell, 410 U.S. 315 (1973) 21, 22

McLish v. Roff, 141 U.S. 661 (1891) 18

Munaf v. Green, 128 S. Ct. 2207 (2008) 18

Pender County v. Bartlett, 649 S.E.2d 364 (N.C. 2007), *cert. granted sub nom Bartlett v. Strickland*, No. 07-689, 128 S. Ct. 1648 (2008) 2, 3, 6, 16

Purcell v. Gonzalez, 127 S. Ct. 5 (2007) (per curiam) 15, 19, 20

Reynolds v. Sims, 377 U.S. 533 (1964) 21, 23, 28

Roman v. Sincock, 377 U.S. 695 (1964) 21, 26

Stephenson v. Bartlett, 562 S.E.2d 377 (N.C. 2002) 2, 5

Stephenson v. Bartlett, 582 S.E.2d 247 (N.C. 2003) 2, 5

Thornburg v. Gingles, 478 U.S. 30 (1986) 16

United States v. Hark, 320 U.S. 531 (1944) 13, 14

Wesberry v. Sanders, 376 U.S. 1 (1964) 22

Wisconsin v. City of New York, 517 U.S. 1 (1996) 26

Wise v. Lipscomb, 437 U.S. 535 (1978) 8

STATUTES

13 U.S.C. § 141(c) 21
13 U.S.C. § 141(e)(2) 27
28 U.S.C. § 1253 11
28 U.S.C. § 2101(b) 1, 10, 11
42 U.S.C. § 1973c 29
2003 N.C. Sess. Laws (Extra Session) 434 1

RULES

Sup. Ct. R. 18.1 10
Sup. Ct. R. 18.3 15

REGULATIONS

28 C.F.R. § 51.28 29
28 C.F.R. Part 51 App. 29

OTHER AUTHORITIES

Brief of Travis County Appellants, *LULAC v. Perry*, 126 S. Ct. 2594 (2006) 22, 23

Census 2000 Count Question Resolution Program, 66 Fed. Reg. 35,588 (July 6, 2001) 4

U.S. Census Bureau, *North Carolina Quick Facts* 24

U.S. Census Bureau, *Strength in Numbers: Your Guide to Census 2000 Redistricting Data from the U.S. Census Bureau* (2000) .. 3, 4, 27

STATEMENT

In this case, the latest in a string of challenges contesting the propriety of North Carolina's post-2000 Census redistricting efforts, Appellants seek to enjoin the use of the districts used for state legislative elections conducted during the 2004 and 2006 election cycles, and during the most recent primary election on May 6, 2008. In November 2007 – four years after the districting plans at issue took effect and with the 2010 census fast approaching – Appellants brought this suit, alleging, *inter alia*, that the plans violated the Fourteenth Amendment's one-person, one-vote requirements, and simultaneously moved for a preliminary injunction. Following extensive briefing by all parties and a hearing, the district court denied the motion on January 28, 2008.

Appellants then failed to timely appeal that judgment within 30 days as required by 28 U.S.C. § 2101(b). In fact, they filed their notice of appeal 52 days after the district court order. The 30 day requirement is jurisdictional, and Appellants' failure to comply with it deprives this Court of jurisdiction. In addition, this appeal fails to raise any issue warranting plenary review by this Court. Appellee-Intervenor North Carolina State Conference of Branches of the NAACP therefore moves to dismiss this appeal or to affirm the judgment below.

The 2000 Round of Redistricting for North Carolina's General Assembly.

The General Assembly adopted the state legislative redistricting plans at issue here in 2003, following extensive state court litigation concerning compliance with the North Carolina Constitution. *See* 2003 N.C. Sess. Laws (Extra Session) 434 §§ 1-4,

12 (the "2003 plans"); *Stephenson v. Bartlett*, 562 S.E.2d 377 (N.C. 2002) ("*Stephenson I*").[1] The 2003 plans were used in the 2004 and 2006 election cycles, and in the May 6, 2008, primary.

Stephenson I considered whether the North Carolina Constitution's Whole County Provisions (the "WCP") had force and effect or were preempted by federal law, particularly the Voting Rights Act of 1965 ("VRA") and the federal constitutional one-person, one-vote requirements. The court held that "[f]ederal law . . . preempts the State Constitution only to the extent that the WCP actually conflicts with the VRA and other federal requirements relating to state legislative redistricting and reapportionment." *Id.* at 396.

In May 2004, a case concerning the proper interpretation of the VRA was filed in North Carolina state court. *Pender County v. Bartlett*, 649 S.E.2d 364, 367 (N.C. 2007), *cert. granted sub nom. Bartlett v. Strickland*, No. 07-689, 128 S. Ct. 1648 (2008). The North Carolina Supreme Court resolved the case in August 2007, holding that the VRA requires the use of single member districts that provide a minority community with the opportunity to elect a candidate

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[1] In November 2001, the North Carolina General Assembly completed redistricting maps in the normal course. *Stephenson I*, 562 S.E.2d at 381. Those plans were, however, immediately challenged on state constitutional grounds. *Id.* Following remand from the North Carolina Supreme Court, a state trial court adopted interim redistricting plans for the 2002 election cycle after finding that plans drawn by the General Assembly did not comply with *Stephenson I*. *Stephenson v. Bartlett*, 582 S.E.2d 247, 249 (N.C. 2003) ("*Stephenson II*"). Next, the North Carolina Supreme Court affirmed the trial court's finding, *id.* at 254, and the General Assembly adopted the 2003 plans.

of choice only when the minority community constitutes at least 50 percent of the district.[2] *Id.* at 374. In recognition that this holding might again require the wholesale redrawing of the North Carolina House and Senate maps, the court held that the General Assembly did not have to undertake redistricting until 2009 given the substantial disruption to the 2008 election cycle that redistricting would create. *Id.* at 376.

Census Data for Redistricting

Every 10 years, the U.S. Census Bureau conducts the federal decennial census and reports data to the states for use in legislative redistricting. Pub. L. 94-171, 89 Stat. 1023 (1975), *codified at* 13 U.S.C. § 141(c). These comprehensive legislative redistricting data are commonly known as "P.L. 94-171 data," and were compiled under the Census 2000 Redistricting Data Program in a multi-phase process. U.S. Census Bureau, *Strength in Numbers: Your Guide to Census 2000 Redistricting Data from the U.S. Census Bureau* 4 (2000), http://www.census.gov/rdo/pdf/strenghth2.pdf.

A P.L. 94-171 data file includes population and demographic data, including race, ethnicity and voting age, at the census block level, the smallest unit of data available.[3] *Id.* at 5, 8. It is

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[2] This Court granted certiorari to review that decision on March 17, 2008. 128 S. Ct. 1648 (2008).

[3] Census blocks are "normally bounded by streets or other prominent physical features or by the boundaries of geographic areas. They may be as small as a typical city block bounded by 4 streets or as large as over 100 square miles in some rural areas. Blocks are identified by a four-digit number, unique within Census 2000 census tracts. Nationally, blocks average

comprehensive, as it provides detailed information about the number of people in the state and locates them within census blocks. *Id.* at 6-9.

Following the 2000 census and provision of P.L. 94-171 data in 2001, the Census Bureau implemented the Count Question Resolution program ("CQR program"), which allows local governmental entities to challenge the accuracy of census housing and group quarter counts. The Census 2000 Count Question Resolution Program, 66 Fed. Reg. 35,588 (July 6, 2001). The types of challenges available under the CQR program were limited, and corrections would "not be incorporated into subsequent data products for Census 2000." *Id.* at 35,593. The CQR program was *not* designed to provide state entities responsible for redistricting with updates or changes to the P.L. 94-171 data. *Id.* at 35,593 ("The Census Bureau will not change the apportionment or redistricting counts to reflect corrections resulting from the CQR process. In accordance with the law . . . the counts required for redistricting were delivered to the states by April 1, 2001.").

When the Census Bureau provided municipalities with corrections to their population totals under the CQR program, the notices specifically said "[c]ensus counts used for Congressional apportionment and legislative redistricting and the Census 2000 data products will remain unchanged." *See, e.g.*, J.S. App. 63. CQR program letters merely include changes to population totals without the comprehensive

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about 100 persons each." *Strength in Numbers: Your Guide to Census 2000 Redistricting Data from the U.S. Census Bureau* at 8.

information provided in a P.L. 94-171 data file. *See, e.g., id.*

In North Carolina, at varying times over the course of the entire program, 88 municipalities received notices concerning their population totals under the CQR program. App. 4a-6a.[4] The largest single adjustment concerned the mistaken double-counting of a dormitory at the University of North Carolina at Chapel Hill. *See id.* The Census Bureau forwarded copies of those letters as they were issued to the General Assembly. *See, e.g.*, J.S. App. 63. Following the conclusion of the CQR program, block level data concerning these changes were distributed on June 10, 2004. App. 5a.

Procedural Background

Plaintiffs-Appellants brought their one-person, one-vote challenge in November 2007, roughly four years after the challenged districting plans took effect in 2003, and as the 2010 census was fast approaching.[5] With their complaint, they filed a motion for a preliminary injunction, alleging that the North Carolina House and Senate districting plans violated the Fourteenth Amendment's one-person, one-vote requirements. To remedy the alleged violation, they requested that the district court enjoin use of the 2003 plans – already used in the 2004 and

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[4] A report including all 2000 CQR program corrections for North Carolina is available at http://www.census.gov/prod/cen2000/notes/blks-37.xls. An excerpt of that report was submitted to the district court, and is reproduced in Appendices B & C. *See* App. 4a-6a.

[5] Plaintiffs-Appellants' counsel, Robert N. Hunter, represented amici in *Stephenson I*, 562 S.E.2d at 381, and was co-counsel for the plaintiffs in *Stephenson II*, 582 S.E.2d at 247.

2006 election cycles – and replace them with maps that accord with their interpretation of the North Carolina Supreme Court's ruling in *Pender County v. Bartlett* – the very remedy that the North Carolina Supreme Court said would be too disruptive to implement in advance of the 2008 election. *Bartlett*, 649 S.E.2d at 376.

Defendants filed a memorandum in opposition to Plaintiffs-Appellants' motion for a preliminary injunction on December 18, 2007. On the same day, the State Conference of Branches of the NAACP moved to intervene as a defendant. Chief Judge Flanagan granted the motion to intervene on January 4, 2008.

On January 25, 2008, the three-judge panel conducted a hearing on the preliminary injunction motion at which all parties presented argument. Three days later, the court issued an order denying the preliminary injunction (the "January 28 Order," reproduced as Appendix A). The order stated,

> where preliminary injunctions are extraordinary remedies involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances, in its discretion, the court finds plaintiffs have not satisfied the weighty burdens upon them. The court will set forth its findings and conclusions in separate memorandum opinion [*sic*]. Accordingly, plaintiffs' motion for preliminary injunction is DENIED.

App. 2a-3a (internal quotation marks and citations omitted).

Plaintiffs-Appellants did not file a notice of appeal following the January 28 Order, even though filing deadlines for the primary elections they sought to enjoin were pending in February. On March 17, 2008, the court issued a memorandum opinion to, in the court's words, "explain our reasoning." J.S. App. 1.

The court first found that, "where Plaintiffs allege solely constitutional harms, determination of irreparable harm requires determining Plaintiffs' likelihood of success on the merits." J.S. App. 14.

The court next considered Plaintiffs-Appellants' assertion that they had established a prima facie violation of one-person, one-vote requirements because without the use of corrected census data, the 2003 districts deviated from the ideal by more than 10%. That is, the absolute value of the district with the largest negative deviation from the ideal district size, plus the absolute value of the district with the largest positive deviation from the ideal district size was greater than 10%. In consideration of this Court's precedents, however, the court "conclude[d] that the General Assembly [wa]s permitted, but not required, to use the corrected data." J.S. App. 18.

It also noted:

> This Court recognizes the fact that states conducting redistricting years after the decennial census are operating under a legal fiction. *See Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003) ("[B]efore the new census, States operate under the legal fiction that even 10 years later, the plans are constitutionally apportioned."). Those circumstances, as well as the inherently legislative nature of the

> redistricting function, support the granting of deference to the judgment of the General Assembly in deciding which data to use. *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978) ("The [Supreme] Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt.").

J.S. App. 18. Accordingly, without showing a likelihood of success on the merits, Plaintiffs could not claim that they had been irreparably harmed. *Id.*[6]

The court further found that "[a]ny delay [in the 2008 election schedule] could affect the ability of North Carolinians to participate meaningfully in the presidential primaries, and granting a preliminary injunction will otherwise disrupt an orderly election process." J.S. App. 21. It ultimately concluded, therefore, that "the public interest in holding an orderly election would be substantially harmed if preliminary injunctive relief were granted," and this justified its denial of the preliminary injunction motion. *Id.* This appeal ensued.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion when it determined that the substantial harm to the public interest that would ensue should the 2008

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[6] The court also considered and rejected Appellants' "little more than conclusory" accusations that North Carolina acted in bad faith when it declined to use the corrected census data in 2003. J.S. App. 20.

election cycle be disturbed outweighed the harm Appellants alleged would result from the use of districts created with 2000 census data officially designated for redistricting. In fact, Appellants suffered no harm at all because North Carolina's use of P.L. 94-171 data for mid-decade redistricting does not offend one-person, one-vote principles. Instead, this Court long ago held that States operate under a legal fiction that does not require them to redistrict with anything other than official census data, even though "census data are not perfect," and "population counts for particular localities are outdated long before they are completed." *Karcher v. Daggett*, 462 U.S. 725, 732 (1983). The minor corrections yielded by the CQR program do not disturb those settled principles.

Where, as here, block-level CQR program data were unavailable at the time the General Assembly redistricted, the selective population adjustment of some North Carolina municipalities, but not others impacted by the CQR program would have introduced arbitrariness into the redistricting process. Moreover, the Fourteenth Amendment does not require North Carolina to pursue the fiction of ensuring population equality among legislative districts based on eight-year-old data, while ignoring the much larger imperfection stemming from the state's population growth of more than 800,000 since those data were collected.

In addition, to do so would leave North Carolina in a quandary because the standards governing state legislative redistricting are unclear. This Court has agreed to hear *Bartlett v. Strickland*, on writ of certiorari to the North Carolina Supreme Court, this

fall. 128 S. Ct. 1648. That case will answer a fundamental question about the scope of the Voting Rights Act's protections. While that legal standard is in flux, elections must go on in North Carolina.

Nevertheless, a dismissal now does not foreclose the possibility of Supreme Court review of the merits at a later point because this Court will have an opportunity to consider the one-person, one-vote claim following a final disposition in the district court.

Although the Court could easily dispose of Appellants' arguments on the merits by summary affirmance, that path is unavailable because it lacks jurisdiction over the case. This appeal is untimely. Appellants did not file a notice of appeal until long after the deadline for doing so had passed. The district court's January 28 Order, in which it entered judgment on the preliminary injunction motion, triggered 28 U.S.C. § 2101(b)'s mandatory and jurisdictional requirement that Appellants file notice of their appeal within 30 days had they wished to seek this Court's review. Because Appellants failed to do so, this appeal must be dismissed.

ARGUMENT

I. The Appeal Is Untimely.

A direct appeal to this Court must be taken within 30 days of an interlocutory order. *See* Sup. Ct. R. 18.1; 28 U.S.C. § 2101(b). Here, the three-judge district court issued its order denying Appellants' motion for a preliminary injunction on January 28, 2008. App. 1a-3a. Having filed their notice of appeal on March 20, 2008 – 52 days after the court issued its

order denying the motion – Plaintiffs' appeal is untimely and this Court lacks jurisdiction to hear this case.

Every statute governing this Court's jurisdiction over direct appeals makes clear that the entry of an *order* granting or denying relief is the event that triggers the filing deadline for a notice of appeal. *See* 28 U.S.C. § 1253 ("[A]ny party may appeal to the Supreme Court from *an order granting or denying*, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." (emphasis added)); *id.* § 2101(b) ("Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the *judgment, order or decree*, appealed from, if interlocutory, and within sixty days if final." (emphasis added)). Accordingly, Appellants would have had to file a notice of appeal within 30 days of the district court's January 28 Order denying their motion for a preliminary injunction.[7]

Here, the January 28 Order in no uncertain terms denied Appellants' motion for a preliminary injunction, and foreclosed completely any further consideration of Appellants' request for relief. It stated that Appellants' motion was "DENIED," App. 3a, because they "ha[d] not satisfied the weighty

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[7] An order denying a motion for a preliminary injunction is an interlocutory one. *See Goldstein v. Cox*, 396 U.S. 471, 478 (1970) ("[O]ur jurisdiction over interlocutory orders under § 1253 is confined to orders granting or denying a preliminary injunction.").

burdens upon them" to justify the "extraordinary remed[y]" of a preliminary injunction. App. 2a (internal quotation marks and citation omitted). At that point, Section 2101(b)'s limited time period for filing a notice of appeal began to run, and the notice of appeal filed by Appellants on March 20 was untimely because it was lodged with the court more than 30 days after January 28.

Appellants state in their notice of appeal that they seek review of the district court's "second order and memorandum opinion" denying their motion for a preliminary injunction in an effort to shift the date for determining the timeliness of its appeal pursuant to § 2101(b). However, such renaming of the order does not cure their appeal's jurisdictional defect. Indeed, no such "second order" exists. Instead, on March 17, 2008, the district court issued a memorandum opinion to, in the court's words, "explain [its] reasoning" for denying the preliminary injunction motion in the January 28 Order. J.S. App. 1. Appellants' suggestion that the district court's March 17 memorandum opinion has any bearing on the timeliness of its notice of appeal is misplaced.

Although Appellants contend that the district court "entered judgment" on March 17, 2008, that description is plainly erroneous because, as the March 17 opinion explains, the court had already taken that step on January 28, 2008. J.S. App. 31 ("*[W]e issued an order* without accompanying memorandum following the January 25 hearing, denying equitable relief." (emphasis added)). The January 28 Order provided Appellants with clear notice of the outcome of their motion, and provided no indication that the court would further consider their

arguments for the issuance of a preliminary injunction. The court spent the intervening time writing an opinion to elaborate on its reasoning for denying the preliminary injunction, but left no doubt that its January 28 Order was the ruling that made its judgment take effect.

Like the circumstances of another case in which this Court considered a similar question, these facts confirm "the natural meaning yielded by the terms of the 'Opinion' and the 'Order of Mandate' . . . which treats not the 'Opinion' but the 'Order for Mandate' as the order of judgment." *Comm'r v. Bedford's Estate*, 325 U.S. 283, 287 (1945). In *Commissioner v. Bedford's Estate*, the opinion was issued before the order, *id.* at 285, and this Court held that the time to appeal ran from the date of the order, not the date of the opinion. *Id.* at 288. The same rule applies here even though in this case, for good reason, the order was issued first. The January 28 Order allowed the state's primary election process to continue undisturbed and put to rest concerns that the primaries for state legislative seats would be delayed. To ignore these facts and hold that the issuance of the March 17 memorandum opinion was instead the relevant act that started the 30-day clock would be to conclude that the district court issued an "empty order" on January 28. *United States v. Hark*, 320 U.S. 531, 535 (1944). There is no evidence that the district court intended to do so.[8]

In short, the January 28 Order is a "formal judgment," and is, therefore, "prima facie the decision

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[8] The docket sheet also identifies the March 17, 2008, entry as a "Memorandum and Opinion for the Court," *not* an order. (Docket # 61).

or judgment rather than a statement in an opinion or a docket entry." *Id.* at 531, 534-35. Appellants have failed to raise any arguments to disturb that conclusion.

Even if this court were to agree with Appellants that the March 17 opinion is a "second" order, it does not suggest that the period for appeal begins to run anew. The mere fact that an earlier order is re-entered, or revised in an immaterial way does not extend the time for appeal. *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-12 (1952). This Court dismissed the appeal in *FTC* because the notice of appeal was filed more than 30 days after an initial judgment was entered, even though the lower court later entered a second judgment in the same case. *Id.* As the Court further explained,

> [o]nly when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. *The test is a practical one.* The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.

Id. (emphasis added). Here, the March 17 opinion did not disturb, revise, or otherwise alter the January 28 Order. Therefore, its later issuance provides no justification for extending the time within which to file an appeal.

Further, given Appellants' requested relief, the only sensible course for a timely appeal would have been to seek immediate review of the district court's

order. They sought to enjoin the use of legislative districts for the 2008 primary. J.S. App. 12. Granting the requested relief would require action by February 2008, in time for candidate filing deadlines and preparation for the 2008 primary. *See* J.S. App. 20-21. Therefore, to have a reasonable chance at achieving their requested relief, Appellants would have had to appeal the district court's order immediately.

Moreover, the district court's reasoning would not be necessary for this Court's review. This Court has not hesitated to reverse rulings on preliminary injunctions simply because the lower court has not provided its reasoning in detail. *See, e.g.*, *Purcell v. Gonzalez*, 127 S. Ct. 5, 7 (2007) (per curiam) (vacating Ninth Circuit's order reversing a district court's denial of a preliminary injunction to suspend use of Arizona's voter identification requirement even though the Ninth Circuit had issued only a "bare order").

Finally, Appellants could have easily secured their right to appeal and abided by this Court's jurisdictional requirements by filing their notice of appeal within 30 days of the district court's ruling, and awaiting the district court's ruling before filing their jurisdictional statement. If necessary, they could have received an extension of the deadline to file their jurisdictional statement with this Court while issuance of the district court's memorandum opinion was pending. *See* Sup. Ct. R. 18.3 (allowing a Justice to extend the time within which a jurisdictional statement may be filed).

In sum, because the notice of appeal was not filed until March 20, 2008, more than 30 days after the

district court issued the January 28 Order denying the motion for a preliminary injunction, Appellants have failed to abide by Section 2101's time limits for filing a notice of appeal. This Court confirmed just last year that those limits are "mandatory and jurisdictional." *Bowles v. Russell*, 127 S. Ct. 2360, 2363 (2007) (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982)). Accordingly, the appeal is untimely and must be dismissed for lack of jurisdiction.

II. Reviewing or Reversing the District Court's Denial of Appellants' Preliminary Injunction Motion Is Unnecessary and Premature While *Bartlett v. Strickland* is Pending in this Court.

Appellees Larry Leake, et al., correctly point out that on any normal full briefing schedule, the relief Appellants seek in this appeal will be moot by the time this Court reviews this case. *See* Appellees' Mot. to Dismiss. Even if this Court were to pursue expedited hearing or summarily reverse the District Court's decision to deny preliminary relief, any attempt to redraw North Carolina's legislative districts to correct for updated census data inevitably raises the question of how the state constitutional Whole County Provisions should be read in conjunction with the requirements of Section 2 of the VRA, 42 U.S.C. § 1973. The North Carolina Supreme Court in *Pender County v. Bartlett* ruled that under *Thornburg v. Gingles*, 478 U.S. 30 (1986), Section 2 only protects districts in which minorities make up a majority of the citizen voting age population. 649 S.E.2d at 372. Therefore, any legislative districts that are not covered by Section 5 of the Voting Rights

Act, are less than 50% in minority citizen voting age population, and divide counties more than otherwise required would be need to be redrawn to meet the one-person, one-vote requirement. This Court, however, has granted a writ of *certiorari* to review this decision. *Bartlett v. Strickland*, 128 S. Ct. 1648 (2008).

Any summary action by this Court to grant interim relief to Appellants pending the full disposition of the case on its merits would require elections for the North Carolina General Assembly to be immediately disrupted and postponed to allow a new redistricting plan based on adjusted census data to be drawn and implemented. In doing so, the General Assembly would have to determine how to comply with *Pender County v. Bartlett*, while that decision is being reviewed by this Court. If this Court determines that the North Carolina Supreme Court's interpretation of vote dilution under Section 2 of the VRA was erroneous in any respect, the interim redistricting plan would need to be changed yet again for the 2010 election cycle. This would result in North Carolina voters, candidates and legislators being subjected at a minimum to three new and different redistricting plans over three election cycles – 2008, 2010 and 2012 – for a grand total of six different plans within the decade.

Such perpetual redistricting is unnecessary. When the District Court ultimately rules on the merits of Appellants' one-person, one-vote claim, an appropriate remedy, if necessary, can be implemented for the 2010 election cycle. Similarly, any changes in North Carolina's districts required by the ultimate resolution of *Bartlett v. Strickland* can

be implemented in 2010. If, however, the current plan is constitutional and applies the correct understanding of Section 2 of the VRA, no changes whatsoever will be required until the legislature redistricts in due course following the 2010 Census.

Moreover, given the procedural posture of this case, this Court can review the district court's ruling that the North Carolina General Assembly had the discretion to use the official P.L. 94-171 data without attempting to incorporate piecemeal and incomplete corrections when redrawing its redistricting plan in 2003 once the case has been finally resolved on the merits. Indeed, doing so avoids the specter of piecemeal appeals in this case. *See McLish v. Roff*, 141 U.S. 661, 665-66 (1891) ("From the very foundation of our judicial system the object and policy of the acts of congress in relation to appeals . . . have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal."). Dismissing this appeal on jurisdictional grounds will not deprive Appellants of an ultimate opportunity for review of the merits of their claims.

III. The District Court Did Not Abuse Its Discretion in Refusing to Grant the Motion for a Preliminary Injunction.

A. The District Court Did Not Abuse Its Discretion in Weighing the Interests.

Appellants did not meet their heavy burden of demonstrating the need for a preliminary injunction. "A preliminary injunction is an extraordinary and drastic remedy; it is never awarded as of right." *Munaf v. Green*, 128 S. Ct. 2207, 2219 (2008)

(internal quotation marks and citations omitted). Instead, a district court applies a "stringent" standard to determine whether a plaintiff is entitled to a preliminary injunction: "the plaintiff [is required] to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits." *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). However, "a district court must weigh carefully the interests on both sides," particularly where, as here, the issuance of a preliminary injunction would "seriously impair the State's interest." *Id.* As the Appellants demonstrated neither irreparable injury nor the likelihood of success on the merits, the district court correctly reasoned that Appellants were not entitled to a preliminary injunction.

On appeal, review of that decision is limited. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006); *Doran*, 422 U.S. at 931-32. "This Court, like other appellate courts, has always applied the abuse of discretion standard on review of a preliminary injunction." *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 664 (2004) (internal quotation marks and citation omitted).

In addition, there are special considerations when an application for a preliminary injunction concerns electoral procedures and comes "just weeks before an election." *Purcell*, 127 S. Ct. at 7. In particular, a court must weigh, "in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases," because "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an

election draws closer, that risk will increase." *Id.* Accordingly, "deference to the discretion of the district court," is required. *Id.*

Here, the district court was well within its discretion – it gave extensive consideration to Appellants' claims of irreparable harm, but found that precisely the type of harm warned of by this Court would ensue if it granted the preliminary injunction: "Any delay [in the 2008 election schedule] could affect the ability of North Carolinians to participate meaningfully in the presidential primaries, and granting a preliminary injunction will otherwise disrupt an orderly election process." J.S. App. 21 (internal quotation marks and citation omitted). It ultimately concluded, therefore, that "the public interest in holding an orderly election would be substantially harmed if preliminary injunctive relief were granted." *Id.* This finding, reached after careful balancing of the interests on both sides, is entitled to deference, and reveals that the district court did not abuse its discretion in denying to Appellants the "extraordinary" remedy of a preliminary injunction.

B. North Carolina Was Not Required to Use Data Other than the Official P.L. 94-171 Data Provided by the Census Bureau When It Completed the 2003 Redistricting Process.

The conclusion that the district court properly exercised its discretion is further sustained because Appellants have failed, as "the party seeking pretrial relief," to meet "the burden of demonstrating a likelihood of success on the merits." *Gonzales*, 546 U.S. at 428. This Court's jurisprudence leaves no

doubt that P.L. 94-171 data are acceptable for redistricting purposes. In addition, North Carolina's use of CQR program data in 2003 would not have helped to achieve equality among the legislative districts.

1. This Court Has Approved the Use of P.L. 94-171 Data for Mid-Decade Redistricting.

When a state undertakes the decennial redistricting process, it must "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable," *Reynolds v. Sims*, 377 U.S. 533, 577 (1964), without the "taint of arbitrariness or discrimination." *Roman v. Sincock*, 377 U.S. 695, 710 (1964). "[T]he overriding objective . . . must be 'substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen of the State.'" *Mahan v. Howell*, 410 U.S. 315, 322 (1973) (quoting *Reynolds*, 377 U.S. at 579). Perfection is not required. *See, e.g.*, *Brown v. Thomson*, 462 U.S. 835 (1983) (upholding Wyoming's state legislative districting plan even though one district was under half of the ideal district size). To meet that objective, a state needs information concerning both the numerosity *and* distribution of its population; that is, it is necessary to know both how many people reside in the state and where they live. Since the 1980 round of redistricting, P.L. 94-171 data have provided both sets of information simultaneously, along with data identifying race, ethnicity and voting age of a population at the block level. *See* 13 U.S.C. § 141(c).

The use of P.L. 94-171 data, the official census data provided to the States for redistricting, meets one-person, one-vote requirements, even for mid-decade redistricting. This Court has approved the use of P.L. 94-171 data repeatedly. *See, e.g.*, *LULAC v. Perry*, 126 S. Ct. 2594 (2006); *Abrams v. Johnson*, 521 U.S. 74 (1997).

In *LULAC v. Perry*, 126 S. Ct. 2594 (2006), this Court considered the propriety of Texas's 2003 mid-decade redistricting undertaken for the sole purpose of gaining partisan advantage. *Id.* at 2606. Although more than two years had passed since the Census Bureau had provided P.L. 94-171 data, Texas used it – without accounting for the corrections yielded through the CQR program. *Id.* at 2611-12. One set of appellants argued that Texas's knowing use of the inaccurate and outdated P.L. 94-171 data violated one-person, one-vote requirements because there, like here, the CQR program had revealed a change to Texas's population that the P.L. 94-171 data did not reflect.[9] *See id.*; Br. of Travis County Appellants at 5 & n.8 (noting that Texas admitted that it used official decennial census data even though the Census Bureau had corrected the 2000 census data before the 2003 redistricting plan took effect). This Court held that Texas's use of P.L. 94-171 data when it completed the 2003 redistricting was constitutional

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[9] As the *LULAC* one-person, one-vote challenge concerned congressional redistricting, Article I, section 2 provided the operative constitutional standard rather than the Fourteenth Amendment's Equal Protection Clause. *See Wesberry v. Sanders*, 376 U.S. 1, 7-9 (1964). "[B]roader latitude has been afforded the States under the Equal Protection Clause in state legislative redistricting," *Mahan*, 410 U.S. at 322, which should apply to North Carolina here.

because "States operate under the legal fiction that their plans are constitutionally apportioned throughout the decade, a presumption that is necessary to avoid constant redistricting, with accompanying costs and instability." *LULAC*, 126 S. Ct. at 2611 (citing *Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003); *Reynolds*, 377 U.S. at 583).[10]

The same legal fiction entitled North Carolina to use P.L. 94-171 data in its 2003 court-ordered redistricting. The harm alleged by appellants in both cases, *i.e.*, the creation of malapportioned districts due to the use of official census data *known* to be inaccurate, does not lead to the conclusion that P.L. 94-171 data are constitutionally suspect simply because they are used mid-decade. To so decide would destabilize the redistricting system, requiring precisely the "daily, monthly, annual or biennial reapportionment," this Court warned against in *Reynolds*, 377 U.S. at 583, and has consistently rejected. Moreover, if Texas did not violate one-person, one-vote principles when it chose to use P.L. 94-171 data in 2003 for a redistricting plan adopted

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[10] Here, Appellants correctly note that following the *Karcher v. Daggett* litigation concerning the 1980 round of redistricting, New Jersey used census data that included corrections to complete redistricting. *See* J.S. 23-24 (citing, *inter alia*, *Karcher v. Daggett*, 462 U.S. 725 (1983); *Daggett v. Kimmelman*, 580 F. Supp. 1259 (D.N.J. 1984)). In *LULAC*, the Travis County appellants also relied on *Karcher v. Daggett* for their argument that Texas acted unconstitutionally when it used official decennial census data rather than corrected census data for redistricting in 2003. *See* Br. of Travis County Appellants at 5 & n.8. However, as discussed above, this Court rejected that argument. CQR program data was available to Texas in 2003, and this Court approved Texas's decision *not* to use it. *LULAC*, 126 S. Ct. at 2611.

to maximize partisan advantage, *LULAC*, 126 S. Ct. at 2612, surely North Carolina's decision to use P.L. 94-171 data in a court-ordered mid-decade redistricting did not violate one-person, one-vote principles.

And, of course, given that North Carolina's actual population today includes approximately 800,000 more people than it did in 2000[11] – far more than the net difference of 2828 people identified through the CQR program – any districting plans that make use of 2000 census data bear no resemblance to reality, making Appellants' "objections . . . increasingly futile." *Abrams*, 521 U.S. at 100. This Court's description of Georgia in 1997 could well apply to North Carolina today:

> The population of Georgia has not stood still. Georgia is one of the fastest-growing States, and continues to undergo population shifts and changes. In light of these changes, the tinkerings appellants propose would not reflect Georgia's true population distribution in any event. The *Karcher* Court, in explaining the absolute equality standard, acknowledged that "census data are not perfect," and that "population counts for particular localities are outdated long before they are completed." *Karcher* was written only two years from the previous census, however, and we are now

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[11] Census data, with CQR program corrections, indicate that North Carolina's population was 8,049,313 in 2000. App. 4a. According to the most recent data from the Census Bureau, North Carolina's population is 8,856,505. *See* U.S. Census Bureau, North Carolina Quick Facts (2006 estimate), http://quickfacts.census.gov/qfd/states/37000.html

> more than six years from one. The magnitude of population shifts since the census is far greater here than was likely to be so in *Karcher*. These equitable considerations disfavor requiring yet another reapportionment to correct the deviation.

Id. at 100-01 (internal citations omitted). Just as in *Abrams*, Appellants ask this Court to find that the district court abused its discretion when it refused to upend the entire electoral map of North Carolina in pursuit of perfecting a fiction. The Fourteenth Amendment does not require that result.

2. The Use of CQR Program Data Would Not Have Helped to Achieve Equality Among the Legislative Districts.

This pursuit is particularly nonsensical in light of the well-understood fact that *all* census data are "inherently less than absolutely accurate." *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973). In particular, "the well-known restlessness of the American people," means that they are outdated as soon as they are compiled. *Karcher*, 462 U.S. at 732. As this Court has described,

> [p]ersons who should have been counted are not counted at all or are counted at the wrong location; persons who should not have been counted (whether because they died before or were born after the decennial census date, because they were not a resident of the country, or because they did not exist) are counted; and persons who should have been counted only once are counted twice. It is thought that these errors have resulted in a

> net "undercount" of the actual American population in every decennial census. In 1970, for instance, the Census Bureau concluded that the census results were 2.7% lower than the actual population.

Wisconsin v. City of New York, 517 U.S. 1, 6 (1996).[12]

Accordingly, "[t]he census is . . . *at best* an approximate estimate of a State's population at a frozen moment in time." *Connor v. Finch*, 431 U.S. 407, 417 n.13 (1977) (emphasis added). Therefore, just like "the good-faith effort to achieve population equality required of a State conducting intrastate redistricting does not translate into a requirement that the Federal Government conduct a census that is as accurate as possible," the Fourteenth Amendment does not require the pursuit of a perfect fiction years after the decennial census has been completed. *Wisconsin*, 517 U.S. at 16-17 (internal quotation marks and citation omitted).

Further, the use of CQR program data in 2003 would have created different problems. In particular, North Carolina would have relied on census data that was marginally more accurate as to numerosity, but far more incomplete and inconsistent in other equally important ways so as to raise the "taint of arbitrariness and discrimination," *Roman*, 377 U.S. at 710. This Court long ago held that States may

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[12] Moreover, the inaccuracies in census data are particularly likely to impact African-Americans. "The problem of the differential undercount has persisted even as the census has come to provide a more numerically accurate count of the population. In the 1980 census, for example, the overall undercount was estimated at 1.2%, and the undercount of blacks was estimated at 4.9%." *Id.* at 7.

account for mid-decade population shifts not reflected in official census data *only* when "[f]indings as to population trends [can] be thoroughly documented and applied throughout the State in a systematic, not an ad hoc manner." *Kirkpatrick v. Preisler*, 394 U.S. 526, 535 (1969). The use of the CQR program data in November 2003 would not have met that standard.

Although the "decennial census is not *only used* for apportionment purposes," *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 341 (1999), P.L. 94-171 data do provide comprehensive information critical to redistricting.[13] It includes *block-level* information on the race, ethnicity and voting age of a state's population. *Strength in Numbers: Your Guide to Census 2000 Redistricting Data from the U.S. Census Bureau* at 9. That is, it provides detailed information about the number of people in the state and locates them within census blocks, whereas CQR program letters do not contain such detailed information. *See, e.g.*, J.S. App. 63. Therefore, under Appellants' approach, North Carolina would have used data from the Census Bureau that not only says "[c]ensus counts used for Congressional apportionment and legislative redistricting . . . will remain unchanged," J.S. App. 63, but fails even to locate with precision where population shifts have occurred. Without such

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[13] Other parts of the Census Act reflect the specificity of certain data products. For example, one section specifically bars the use of mid-decade census data collected for use in administering public benefit programs for apportionment. *See* 13 U.S.C. § 141(e)(2) ("Information obtained in any mid-decade census shall not be used for apportionment of Representatives in Congress among the several States, nor shall such information be used in prescribing congressional districts.").

information, North Carolina would have been unable to achieve "substantial equality ... *among the various districts*," *Reynolds*, 377 U.S. at 579 (emphasis added), because it would not have known precisely within which districts the population was distributed.[14] P.L. 94-171 data, on the other hand, *are* designed specifically for the use to which North Carolina put it in 2003, and the Constitution does not require otherwise.

Moreover, the selectivity of Appellants' proposed remedy to the alleged constitutional violation would create a different and serious problem. Although Appellants focus on the population change revealed by the CQR program in Orange County, 87 other North Carolina municipalities received notices of changes to their populations, App. 4a-5a, and there is no indication that the other changes would have been easy to identify and locate. To account for just one of 88 changes revealed by the CQR program would be both inconsistent and contrary to the general principles of fairness underlying the one-person, one-vote requirements, designed to ensure "substantial" but not perfect, population equality. *See Reynolds*, 377 U.S. at 579. In short, the CQR program provided only limited information on corrections to the 2000 census. North Carolina needed more information to redistrict using consistent standards, and it was not required to rely on information that "was not

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[14] As noted above, the Census Bureau did not provide the CQR program corrections to North Carolina at the block level until June 2004. App. 5a.

available . . . at the time it enacted the plan at issue." *Karcher*, 462 U.S. at 728 n.1.[15]

C. Without Any Credible Evidence that the North Carolina General Assembly Acted in Bad Faith, the District Court Did Not Abuse Its Discretion in Denying the Preliminary Injunction.

The district court did not abuse its discretion in rejecting Appellants' baseless accusation that North Carolina legislators used P.L. 94-171 data in bad faith when they redistricted in 2003. As the court explained, Appellants failed to "provide a link" between their "vague allegations of conspiracy" and the General Assembly's decision to use the original census data in its districting plan. J.S. App. 20. The absence of such a link is particularly relevant in view of the rational reasons to disfavor use of the problematic CQR program data described above. *See supra* at 26-29. Nothing in Appellants' jurisdictional statement undermines the district court's conclusion. In short, Appellants' assertions are supported by only rank speculation, and the district court correctly

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[15] Moreover, the use of P.L. 94-171 data is particularly important for states, like North Carolina, that are covered in whole or in part by Section 5 of the Voting Rights Act and must ensure that their redistricting plans do not result in retrogression of minority voting strength. *See* 42 U.S.C. § 1973c. Since at least 1975, 40 North Carolina counties have been covered jurisdictions under Section 5. *See* 28 C.F.R. Part 51 App. Therefore, North Carolina must obtain preclearance of its state legislative redistricting plans before they may take effect. *See Lopez v. Monterey County*, 525 U.S. 266, 282 (1999). As it provides information on race, ethnicity and voting age at the block level, the use of P.L. 94-171 data facilitates Justice Department review of redistricting plans. *See* 28 C.F.R. § 51.28(a)(4) & (5).

recognized that these vague accusations were "little more than conclusory" in nature. *See* J.S. App. 20.

Not only do Appellants fail to provide evidence of their allegations, but the circumstances under which the General Assembly enacted the 2003 districting plans underscore that Appellants' claims are contrary to common sense. When the Census Bureau released the corrected data, the information first was sent to numerous local and state officials with the disclaimer that the corrected data were *not* to be used for redistricting purposes. *See* J.S. App. 63. The public nature of the release in combination with the disclaimer make it highly unlikely that state legislators covertly hatched a plan to hide already widely available data. To the contrary, opting to redistrict based on data carrying such a warning would have been *more* suspicious.

In sum, given the lack of actual evidence of bad faith and the circumstances under which the 2003 plans were adopted, the district court did not abuse its discretion in denying the preliminary injunction motion on Appellants' bad faith claim.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted,

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July 23, 2008

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION
NO. 2:07-CV-00051-FL-AD-RC

January 28, 2008

ORDER

JOSEPH DEAN, et al.,
Plaintiffs,
v.
LARRY LEAKE, in his official capacity as Chairman of the North Carolina State Board of Elections, et al.,
Defendants.

Before Allyson K. Duncan, United States Circuit Judge, Fourth Circuit; Robert J. Conrad, Jr., Chief United States District Judge for the Western District of North Carolina; and Louise W. Flanagan, Chief United States District Judge for the Eastern District of North Carolina, sitting by designation as a three-judge District Court

This matter, raising questions of federal and state law in the context of electoral apportionment in the North Carolina state election process, came before the court January 25, 2008, for hearing on plaintiffs' motions for preliminary injunction and defendants' motion to hold in abeyance any consideration of the merits of the action, including any responsibility of defendants to answer or otherwise respond to the

complaint until final disposition of a petition for *writ of certiorari* filed with the United States Supreme Court in *Bartlett v. Strickland* 76 U.S.L.W. 3289 (U.S. Nov. 21, 2007)(No. 07-689), seeking review of decision of the North Carolina Supreme Court in *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007).

The motion to hold in abeyance necessarily implicates the court's consideration of the motion for preliminary injunction. Accordingly, the court disposes of the latter filed motion first. Defendants acknowledge several of plaintiffs' claims do not rely on the decision in *Pender County*. The motion for injunctive relief focuses upon these allegations involving dilution of one person one vote and use of incorrect census data. Judicial economy and the public interest do not, as urged by defendants, favor withholding consideration of the issues raised on motion for preliminary injunction until resolution of *Pender County*. The court, in its discretion, DENIES defendants' motion without prejudice to its right to refile should the Supreme Court grant the petition for certiorari. Defendants shall have twenty (20) days from date of entry of this order to answer or otherwise respond to the complaint.

Turing now to the motion for preliminary injunction, where "preliminary injunctions are extraordinary remedies involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances," *Microstrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir .2001) (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 816 (4th Cir. 1992)), in its

discretion, the court finds plaintiffs have not satisfied the weighty burdens upon them. The court will set forth its findings and conclusions in separate memorandum opinion. Accordingly, plaintiffs' motion for preliminary injunction is DENIED.

Where defendants shall have twenty (20) days from date of the entry of this order to answer or otherwise respond to the complaint, pursuant to the Federal Rules of Civil Procedure 26(f), the parties shall prepare a joint report and plan to be submitted to the court no later than March 10, 2008. Upon its receipt and review, the court shall enter a scheduling order in accordance with Federal Rule of Civil Procedure 16(b), the Local Civil Rules, EDNC, and the court's regular administrative procedures. If either party desires conference with the court prior to entry of the scheduling order, request may be made in the joint report and plan.

SO ORDERED, this 28th day of January, 2008.

FOR THE COURT:

LOUISE W. FLANAGAN
Chief United States District Judge

APPENDIX B

Census Bureau Website Screenshot

http://www.census.gov/prod/cen2000/notes/blks-37.xls

Corrected Census 2000 Total Population, Group Quarters Population, Total Housing Unit, and Vacant Housing Unit Counts for Census Tracts and Blocks

Note: Corrected counts are a result of the Court Ordered Resolution (COR) Program.

Federal Register/Vol. 66, No. 130/Friday, July 6, 2001 (Summary): The COR program is not a mechanism or process to challenge the March 9, 2001 decision of the Secretary of Commerce to release unadjusted numbers from Census 2000 for redistricting purposes; nor is it a mechanism or process to challenge or revise the numbers sent to the President on December 28, 2000 to be used to apportion the U.S. House of Representatives.

The state level census counts in the table are presented, regardless of whether or not there is a COR change to the counts at the state level. Below the state level, the tables will present census counts for all counties (FIPS), county subdivisions, census tracts and blocks in which a COR change has occurred, with one exception: where a COR change occurs in a place that is in more than one county, the table will display census counts for all the county parts, regardless of whether or not each part had a COR change. States with no COR changes (and no tables) are Maine, New Hampshire, and Rhode Island.

| State (FIPS) | County (FIPS) | County Subdivision (FIPS) | Place (FIPS) | Census Tract | Census Block | 2000 Census Counts | | |

Corrected Census 2000 Total Population, Group Quarters Population, Total Housing Unit, and Vacant Housing Unit Counts for Census Tracts and Blocks-cont.

State County County Subdivision Place Census Tract Census Block	State FIPS	County FIPS	County Subdivision FIPS	Place FIPS	Census Tract	Census Block	2000 Census County							
							Tabulation (Original)				Corrected (Revised)			
							Total Population	Group Quarters Population	Total Housing Units	Vacant Housing Units	Total Population	Group Quarters Population	Total Housing Units	Vacant Housing Units
Nashville town, Nash County	37	127		46000			4 309	347	1 751	122	4 417	347	1 793	129
New Bern city, Craven County	37	049		46340			23 128	586	11 094	1 068	23 111	586	11 088	1 063
Newton city, Catawba County	37	035		47000			12 560	233	5 366	361	12 659	336	5 385	381
Oak City town, Martin County	37	117		48080			339	-	182	18	376	-	176	18
Parkton town, Robeson County	37	155		50340			429	-	193	18	429	-	194	18
Pembroke town, Robeson County	37	155		51080			2 399	34	1 043	82	2 661	316	1 043	82
Pinehurst village, Moore County	37	125		51940			9 708	443	5 868	1 158	9 729	482	5 870	1 158
Pine Level town, Johnston County	37	101		52020			1 313	-	652	60	1 319	6	652	60
Pink Hill town, Lenoir County	37	107		52400			521	-	233	27	582	-	245	27
Polkton town, Anson County	37	007		53140			1 195	408	336	39	1 916	1 127	336	39
Princeton town, Johnston County	37	101		53820			1 086	-	529	54	1 090	-	537	55
Raleigh city	37	000		55000			276 093	17 316	120 699	8 091	276 094	17 316	120 700	8 091
Durham County (part)	37	063		55000			-	-	-	-	-	-	-	-
Wake County (part)	37	183		55000			276 093	17 316	120 699	8 091	276 094	17 316	120 700	8 091
Raynham town	37	155		55340			67	-	26	1	72	-	31	1
Rhodhiss town	37	000		56240			366	-	185	18	384	-	195	18
Burke County (part)	37	023		56240			327	-	167	16	312	-	161	16
Caldwell County (part)	37	027		56240			39	-	21	2	72	-	34	2
River Bend town, Craven County	37	049		56710			2 923	124	1 477	134	2 923	124	1 477	134
Rocky Mount city	37	000		57500			55 893	1 164	24 187	2 732	55 977	1 251	24 187	2 732
Edgecombe County (part)	37	065		57500			17 297	42	7 881	922	17 414	158	7 062	823
Nash County (part)	37	127		57500			38 596	1 122	17 086	1 810	38 563	1 122	17 085	1 813
Rutherford College town, Burke County	37	023		58440			1 293	10	570	29	1 303	10	574	29
St Pauls town, Robeson County	37	155		58720			2 137	-	935	78	2 247	-	985	78
St Stephens CDP, Catawba County	37	035		58730			9 439	101	3 683	177	9 429	101	3 679	177
Smithfield town, Johnston County	37	101		62520			11 510	1 335	4 674	257	10 887	692	4 674	257
Stallings town, Union County	37	179		64420			3 169	-	1 222	42	3 171	-	1 217	43
Swansboro town, Onslow County	37	133		66360			1 428	1	770	115	1 459	1	819	141
Taylorsville town, Alexander County	37	003		66960			1 799	156	819	73	1 813	156	827	73
Taylortown town, Moore County	37	125		66960			845	-	337	29	875	-	349	29
Trent Woods town, Craven County	37	049		68340			4 192	-	1 744	52	4 224	-	1 783	98
Trinity city, Randolph County	37	151		68400			8 690	-	2 789	121	8 714	-	2 787	121
Valley Hill CDP, Henderson County	37	089		69840			2 137	151	1 049	158	2 088	19	1 051	158
Wade town, Cumberland County	37	051		70340			480	-	228	24	510	-	234	26
Wadesboro town, Anson County	37	007		70380			3 552	179	1 585	182	3 588	179	1 589	187
Washington city, Beaufort County	37	013		71220			9 583	452	4 399	431	9 619	452	4 415	435
Whiteville town, Martin County	37	117		74220			5 843	246	2 508	156	5 946	246	2 548	196
Wilson's Mills town, Johnston County	37	101		74580			1 291	-	505	40	1 296	-	508	40
Windsor town, Bertie County	37	015		74880			2 283	87	1 060	142	2 324	87	1 100	145
Wingate town, Union County	37	179		74760			2 408	556	825	74	2 466	556	825	74
Winterville town, Pitt County	37	147		75060			4 791	42	1 937	89	4 794	42	1 938	88

- represents zero

Source: Population Division, U.S. Census Bureau, released 8/10/2004

APPENDIX C

Census Bureau Website
http://www.census.gov/prod/cen2000/notes/blks-37.xls

[Reproduction of text on 4a]

Corrected Census 2000 Total Population, Group Quarters Population, Total Housing Unit, and Vacant Housing Unit Counts for Census Tracts and Blocks

Note: Corrected counts are a result of the Count Question Resolution (CQR) Program.

Federal Register/Vol. 66, No. 130/Friday, July 6, 2001 (Summary): The CQR program is not a mechanism or process to challenge the March 6, 2001, decision of the Secretary of Commerce to release unadjusted numbers from Census 2000 for redistricting purposes; nor is it a mechanism or process to challenge or revise the numbers sent to the President on December 28, 2000, to be used to apportion the U.S. House of Representatives.

The state level census counts in this table are presented, regardless of whether or not there is a CQR change to the counts at the state level. Below the state level, the tables will present census counts for all counties, places, county subdivisions, census tracts and blocks in which a CQR change has occurred, with one exception - when a CQR change occurs in a place that is in more than one county, the table will display census counts for all the county parts, regardless of whether or not each part had a CQR change. States with no CQR changes (and no tables) are Maine, New Hampshire, and Rhode Island.

101

(4)

No. 07-1458

Supreme Court, U.S.
FILED
AUG - 4 2008
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

Joseph Dean, et al.,
Appellants,
v.
Larry Leake, et al.,
Appellees,

And

North Carolina State Conference of Branches of the NAACP,
Appellee-Intervenor

On Appeal from the United States District Court for the Eastern District of North Carolina

---

BRIEF OPPOSING APPELLEES' AND APPELLEE-INTERVENOR'S MOTION TO DISMISS OR AFFIRM

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37

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....ii

REASONS FOR DENYING THE MOTIONS TO DISMISS OR AFFIRM.....1

I. The Notice of Appeal was timely filed.....1

II. The Court reviews the Interlocutory Orders *De Novo* for Errors of Law.....2

III. The Appeal is not moot.....3

IV. Motions to Dismiss Raise Irrelevant Disputes of Fact.....5

CONCLUSION.....11

APPENDIX

Feb.20, 2003 Letter of Cathy McCully, Chief Census Bureau Redistricting Office.....App.1

Chart County Corrections to 2000 Federal Census..... App. 2

Census 2000 Informational Memorandum No. 100.....App. 3

TABLE OF AUTHORITIES

CASES

Bartlett v. Strickland, 128 S. Ct. 1648 (2008).....3,5

Burns v. Richardson, 384 U.S. 73 (1966).....2

Clemons v. Board of Education of Hillsboro, 228 F.2d 853 (6th Cir. 1956).....2

FEC v. Wisconsin Right to Life, 127 S.Ct. 2652 (2007).....4

Karcher v. Daggett, 462 U.S. 725 (1983).....8

City of Los Angeles v. Lyons, 461 U.S. 95 (1983).....4

LULAC vs. Perry, 548 U.S. 399 (2006).....9, 11

Natural Res. Defense Council, Inc. v. Morton, 458 F.2d 827 (C.A.D.C. 1972).....2

Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911).....4

Spencer v. Kemna, 523 U.S. 1, 17 (1998).....5

Stephenson vs. Bartlett, 562 S.E.2d 377 (N.C. 2002).....3

Union Tool Co. v. Wilson, 259 U.S. 107 (1922).....2

United States v. Dixie Highway Exp., Inc., 389 U.S. 409 (1967).....2

Wisconsin vs. City of New York, 517 U.S. 1, (1996).....8

Youngstown Sheet & Tub Co. v. Sawyer, 343 U.S. 579 (1952).....2

STATUTES

28 U.S.C. §1253.....1

28 U.S.C. § 2101(b).....1

Federal Rule of Civil Procedure Rule 52.....1

Federal Rule of Civil Procedure Rule 54.....1

Federal Rule of Civil Procedure Rule 58.....1

REASONS FOR DENYING THE MOTIONS TO DISMISS OR AFFIRM

I. The Notice of Appeal was timely filed.

Appellants seek to invoke this court's jurisdiction under 28 U.S.C. §1253, which grants a party a right of direct appeal to the U.S. Supreme Court from interlocutory injunctions of a properly convened three judge panel. The time for an appeal under this statute is governed by 28 U.S.C. § 2101(b) which requires that an appeal be taken "within thirty days from the judgment, order or decree, appealed from, if interlocutory". The three-judge panel entered two orders covering the same issue, the first a simple denial of the Appellants motion for preliminary injunction was entered on January 28, 2008, which provided the following statement: "The court will set forth its findings and conclusions in separate memorandum opinion."

Federal Rules of Civil Procedure ("FRCP") Rules 52, 54 and 58 require an interlocutory injunction or a final order so as to initiate the thirty-day time period for filing the notice of appeal to "find facts specially and state its conclusions of law". The district court's Jan. 28, 2008 order did not under the federal rules of civil procedure constitute a final order so as to initiate the thirty-day time period for filing the notice of appeal. " Rule 52(a)(2) states: "*For an Interlocutory Injunction*. In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action."

When a court issues a second judgment, order or decree involving the same issues as an earlier decree, this court has consistently held that Appellant's appeal is timely filed if entered 30 days from the entry of the latter order. This is particularly true in election or redistricting cases. *Burns v. Richardson*, 384 U.S. 73 (1966), *U.S. v. Dixie Highway Exp., Inc.*, 389 U.S. 409 (1967).

II. The Court reviews the Interlocutory Orders *De Novo* for Errors of Law

The operative facts are undisputed. If the CQR enumerated data is applied to the 2003 redistricting map, districts are not equally populated within a 10% range of deviation as required by state law. Since the three judge panel's decision rests solely on an erroneous interpretation of law, this Court, must correct this error because it has the effect of determining the outcome of the cause of action. The "abuse of discretion" standard of review is limited to factual issues appellate courts always review purely legal questions *de novo*. *Natural Res. Defense Council, Inc. v. Morton*, 458 F.2d 827 (C.A.D.C. 1972) citing *Youngstown Sheet & Tub Co. v. Sawyer*, 343 U.S. 579, 584-585, (1952). See also *Clemons v. Board of Education of Hillsboro*, 228 F.2d 853 (6th Cir. 1956) the trial court abuses its discretion when it fails or refuses properly to apply the law to conceded or undisputed facts. Citing *Union Tool Co. v. Wilson*, 259 U.S. 107 (1922).

The court's legal determination that the Plaintiffs are unable to succeed on the merits

because the court is not required to use correct enumerated census data in measuring redistricting challenges based upon one person, one vote statistical analysis is clearly erroneous. If the CQR census data is used, the Plaintiffs are able to establish they will succeed on the merits of their claim because numerous districts are outside the 10% range of deviation. This fact alone establishes irreparable harm because a constitutional right has been violated and shifts the burden of proof to the defendants to show a compelling governmental interest to justify overpopulating election districts. Because the North Carolina Constitution would prevent such overpopulation, this interest could never be shown as a matter of law. *Stephenson vs. Bartlett,* 562 S.E.2d 377 (N.C. 2002).

III. The appeal is not moot.

The Appellants realize that because of the time required for this appeal the elections for the General Assembly are proceeding in 2008. Nonetheless, Appellants if they are successful could be entitled to remedial elections in 2009 or legal elections in 2010.

This Court's decision to grant certiorari in *Bartlett v. Strickland*, 128 S. Ct. 1648 (2008) ("hereinafter *"Strickland"*) has effected both the facts and the timing of this case. If *Strickland* is affirmed then the North Carolina legislature must redistrict, such redrawing will affect more districts across North Carolina than just Pender County. If the lower court's opinion in this case is left uncorrected,

then the 2009 Legislature will revert to using erroneous data.

Complete enumerated census block level data is now available and fully assessable for compliance with one person one vote. The leadership of the North Carolina Legislature, for political reasons described in Appellants' jurisdictional statement at pp.10-20, do not want to use this data in any revisions when they occur.

If this Court decides this appeal in any manner which does not correct this error of law, then the Appellants will continue to suffer the irreparable deprivation of a constitutional right and be unable to obtain relief in time to prevent any new redistricting scheme from being put into operation. The 2009 special elections will be lost and the same timing issues present in this case will insure that no legal election will be held in this decade. Judicial economy demands that the error of law be corrected now rather than forcing the courts the litigants and the voters to spend time, money, and resources while their right to vote is diluted.

This appeal also fits within the established exception to mootness for disputes capable of repetition, yet evading review. See *FEC v. Wisconsin Right to Life*, 727 S.Ct. 2652 (2007) citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 109, (1983); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515,(1911). The exception applies where "(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable

expectation that the same complaining party will be subject to the same action again". *Spencer v. Kemna*, 523 U.S. 1, 17, (1998) ... Both circumstances are present here."

IV. Motions to Dismiss Raise Irrelevant Disputes of Fact

Appellee-Intervenors, who do not have actual knowledge of the facts, invite this court into a maze of imagined factual disputes regarding the CQR program. While Appellants disagree with the Appellee-Interventors contentions, the court below did not decide those issues, and this court need not resolve these issues to resolve legal error in this case.

These factual disputes are too numerous for this limited space but out of an abundance of caution some of these issues are addressed herein. The lower court determined that it did not need to decide such issues because its decision is decision based solely on the question of law made any such factual findings unnecessary. Appellants need this court to correct the error of law so that resulting issues which may still exists after a *Strickland* decision may be subsequently decided. For example, if this court corrects the error of law and affirms *Strickland* little or no discovery would be required.

Appellees intimate that "block level data for the corrections unknown by the legislature until June 10, 2004. The block level data changes for many, if not all, of the jurisdictions were available to the North Carolina Legislature prior to the

Legislature's enactment of the Nov. 25, 2003 legislative redistricting scheme. Appendix 1. Feb. 20 2003 letter of Cathy McCully, chief, census redistricting data office. "[t]he second type of letter provides the research results of a claim. These letters will inform you of the Census blocks affected and whether the change was associated with group quarters." Appendix 2 is a chart provided by state Appellees which indicates when they received the letters describing the corrections for each county in the state. Appellants lack adequate knowledge to determine the veracity of the chart provided by state Appellees, from the information in possession of Appellants the Orange County corrections may be the only corrections which did not include the block level data at the time that the corrected certificates were provided to the local jurisdictions. As stated in Appellants' JS block level data was unnecessary in order to use the Orange County data for redistricting purposes. (See also JS pp.6 fn. 3 & 16-19). As noted in Appellants' JS at p 5 the Census Bureau had to have the total population and characteristic data (racial and age) for the block level in their possession at the time they corrected the certificates. Had the state of North Carolina sought this data it could have acquired it.

Whether North Carolina possessed corrected characteristic data (racial, ethnic and age) is immaterial to the question of one person one vote and the corrected enumerated census data for total population which is the component used in North Carolina to measure one person one vote. The characteristic data from the original PL 94-171 data can still be used for all purposes involving

redistricting for which consideration of such characteristic data would be appropriate. It remains just as accurate as it did previously and the failure to acquire corrected enumerated data for the characteristic data does not make the corrected enumerated total population data any less accurate. The people of North Carolina should not have their right to vote diluted because North Carolina made no effort to improve the accuracy of the characteristic data.

The CQR program issues only enumerated census data The CQR program is described in CENSUS 2000 INFORMATIONAL MEMORANDUM NO. 100 and was provided to the North Carolina Legislature. (See Appendix 3). This memorandum is provided to all jurisdictions to inform them of the CQR program and how to document possible errors in processing the data which was collected. This memorandum makes clear that under the CQR program "***the Census Bureau will not collect new information.***" (Emphasis in original.) These same processes occur in the enumerated census and double-check the original geographic assignments, record selection and math.[1] The memorandum also states "the corrected CQR counts that are issued are

[1] It is unfortunate that this process was delayed until 2003 for the 2000 Census when the process has taken place much earlier in all prior censuses. It was delayed two years for the 2000 Census because of the ill-advised attempt by the Census Bureau to statistically adjust the 2000 Census instead of taking an enumerated headcount as required by the United States Constitution. The post census local review program which produced corrections in 1981 and 1991 for the 1980 in 1990 censuses respectively is essentially the exact same program as CQR except it is performed two years later. It is essentially the final part of the decennial enumerated census.

based on the housing unit and population counts as of April 1, 2000. The new official census counts may be used by the governmental entities for all programs requiring official Census 2000 data." The process involved in CQR identifies each specific error and then corrects it. Each correction carries the original closer to perfection.

This is what happened in *Karcher v. Daggett*, 462 U.S. 725 (1983). The first set of corrections made the census enumerated total population data more accurate than the original, the second set of corrections made the total population data even more accurate than the first set of corrections did.

The CQR corrections should have been entered into North Carolina's redistricting database as they were received. The CQR program ended on September 30, 2003. At that time all of the data including block level data should have been available. If not supplied, its delivery could have been expedited had the State requested it. The data produced by the CQR program is corrected enumerated census data and is the most numerically and distributively accurate enumerated census data available and will remain so until it is replaced by the results from the 2010 census.[2]

Appellee-Intervenors incorrectly assert that the Census Bureau has precluded the use of this data by a federal court for the purposes of assessing compliance with the one-person one-vote principle. Under this Court's precedent the Census Bureau

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[2] This is consistent with *Wisconsin vs. City of New York*, 517 U.S. 1, 20 (1996).

could not through a disclaimer prevent a federal court from considering what is obviously relevant evidence, furthermore the language used by the Bureau in the disclaimers clearly is not intended to prohibit the use of the data in redistricting or by the courts. The Census Bureau states that it will not reissue the PL 94-171 redistricting data summary files. The Census Bureau does state that it is recertifying the official 2000 Census total population counts and issued new official certificates showing the new total population counts for each jurisdiction and provided block level errata with most if not all of these certificates. See Appendix 3. The corrected data was also available on the Bureau's web site. Not reissuing the entire redistricting data summary files makes perfect sense. In 2003 over 90 percent of America's jurisdictions redistricting would have been completed. The few jurisdictions which still had to redistrict could simply make use of the errata to correct to their existing PL 94-171 file. This appears consistent with the prior practice under the post census local review.

Contrary to motions, the legal issue presented by this appeal was not presented to this court in *LULAC vs. Perry*, 548 U.S. 399 (2006). Nowhere in the opinions issued by any court in *LULAC* is the question of corrected census data discussed. The briefs filed by Travis County in the *LULAC* case indicate why neither court considered the issue. In Travis County's Supreme Court's brief, the only mention of corrected census data is on page 5 and reads: "[t]he redistricting plan used the uncorrected population count from the 2000 Census to meet the constitutional requirement of equipopulous

districts." This sentence is footnoted and it states: "the Census Bureau had officially corrected the 2000 Census and added 30 people to Texas' total population before plan 1374 C. was enacted." The footnote is followed by a citation to a trial exhibit which was not included in the Joint Appendix. Travis County's jurisdictional statement contained virtually the same language.

Travis County was incorrect, 30 people were not added by the corrected census count but instead were subtracted. Travis County did not assert at either the trial or the appellate level that the District Court should have assessed the redistricting plans produced by the Legislature of the state of Texas for compliance with one person one-vote using the corrected census data produced by the CQR program. Nor did Travis County assert that the Texas legislature was aware of the corrected census data.

Travis County's passing mention of the Census Bureau's correction was in support its argument that since the state of Texas had enjoyed rapid growth in the three years since the 2000 Census, any new redistricting map could not be drawn unless a new census was taken. This contention was rejected by this court. Travis County's logic would have forced the continued use of the prior Democrat gerrymandered redistricting scheme drawn using the exact same census data as the legislatively enacted congressional redistricting plan.

Appellants herein take an even more attenuated position. They suggest that because the state of North Carolina has enjoyed considerable growth since the taking of the 2000 census it is more appropriate to use the erroneous total population data to draw any new redistricting plans as opposed to the corrected data which eliminates the mathematical and clerical errors that existed in that data. Both sets of data are enumerated data both measure the population as of April 1, 2000. The only difference is one is known to be erroneous and the other has those known errors corrected. If the corrected data were available to the legislature and they had knowledge of this, common sense demands that the courts assess one person one vote using this data. But to assert as Appellants and the district court do that the knowledge of the errors is irrelevant, so that if the state decides that it wants to use the data which it knows is erroneous the district court should and would use the erroneous census data to assess one person one vote defies all logic and all of this Court's prior precedent. This court rejected this type of circular argument when Travis County made it in the *LULAC* case and this court should reject it again in this case.

Conclusion

Appellants request this court to summarily reverse the District Court on the question of law, then remand this case to the District Court for further proceedings consistent with this Court's prior rulings and instruct the District Court to use the most accurate enumerated census data of which the North Carolina Legislature was or should have

been aware of at the time that the redistricting scheme was enacted when it assesses compliance with the one person, one vote principle.

Respectfully submitted,

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APPENDIX 1

United States Department of Commerce
Economic and Statistics Administration
U.S. Census Bureau
Washington, D.C. 20333-00011
OFFICE OF THE DIRECTOR

Feb. 20 2003

Mr. Terrence Sullivan
Director of Research
NC General Assembly
Legislative Services Office
LOB, Room 545
300 North Salisbury Street
Raleigh, NC. 27603

Dear Mr. Sullivan:

In an effort to provide complete information on the results of the Count Question Resolution Program for your state, I am providing recent correspondence that has been issued to local governments. This additional correspondence may include two types of letters. The first type is a letter which informs the local government that the Census Bureau's research does not support the claim made, and that no change is forthcoming from the Census Bureau. The second type of letter provides the research results of a claim. The letters will inform you of the census blocks affected and whether the change was associated with group quarters. The detail does not go beyond the affected blocks. For this second type, a letter providing the certified counts for the affected jurisdictions should follow soon.

We will continue to provide you with copies of the" certification letters" and "research complete letters" as they arrive in our office. If you have any question regarding this

mailing do not hesitate to give me a call on 301-763-4039 or via email at catherine.clark.mccully@census.gov.

Sincerely,

Cathy McCully, Chief
Census Redistricting Data Office

Enclosures

cc: Mr. Bill Gilkerson, Legislative Services
Mr. Dan Frey, GIS Programmer/Analyst
Mr. Gerry Cohen, Director of Bill Drafting Legislative Services Office

APPENDIX 2

County Corrections to the 2000 Federal Census

EXHIBI

(Muni. COR Correct.)		Date of	Population			Group Quarters			Total HU			Vacant HU		
Number	County	Correction	Corrected	Original	Change	Corrected	Original	Change	Corrected	Original	Change	Corrected	Original	Change
1	Bertie	10/23/03	19,757	19,773	-16	198	198	0	9,043	9,050	-7	1,306	1,307	-1
2	Brunswick	10/10/03	73,141	73,143	-2	724	724	0	51,430	51,431	-1	20,993	20,993	0
3	Burke	9/12/02	89,145	89,148	-3	3,610	3,610	0	37,427	37,427	0	2,899	2,899	0
4	Caldwell	4/23/03	77,386	77,415	-29	1,149	1,149	0	33,420	33,430	-10	2,662	2,662	0
5	Catawba	9/09/02	141,686	141,685	1	2,142	2,142	0	59,921	59,919	2	4,388	4,386	2
6	Chowan	4/23/03	14,150	14,526	-376	323	699	-376	6,443	6,443	0	863	863	0
7	Craven	1/06/04	91,523	91,436	87	5,137	5,137	0	38,194	38,150	44	3,576	3,568	8
8	Edgecombe	12/04/03	55,606	55,606	0	1,122	1,122	0	24,003	24,002	1	3,611	3,610	1
9	Gaston	10/10/03	190,304	190,365	-61	3,091	3,091	0	78,813	78,842	-29	4,906	4,906	0
10	Hertford	4/23/03	22,977	22,601	376	796	420	376	9,724	9,724	0	771	771	0
11	Johnston	12/03/03	121,900	121,965	-65	1,717	1,717	0	50,163	50,196	-33	3,601	3,601	0
12	Lee	5/17/02	49,208	49,040	168	896	896	0	19,983	19,909	74	1,449	1,443	6
13	Lenoir	5/17/02	59,636	59,648	-12	1,769	1,769	0	27,178	27,184	-6	3,322	3,322	0
14	Macon	10/16/03	29,808	29,811	-3	533	533	0	20,745	20,746	-1	7,918	7,918	0
15	Martin	10/16/03	25,546	25,593	-47	291	291	0	10,910	10,930	-20	910	910	0
16	Mecklenburg	10/10/03	695,370	695,454	-84	15,412	15,412	0	292,755	292,780	-25	19,365	19,364	1
17	Moore	11/07/03	74,762	74,769	-7	1,662	1,662	0	35,145	35,151	-6	4,438	4,438	0
18	Nash	12/04/03	87,385	87,420	-35	2,127	2,127	0	37,049	37,051	-2	3,410	3,407	3
19	New Hanover	5/17/02	160,327	160,307	20	4,266	4,266	0	79,634	79,616	18	11,443	11,433	10
20	Orange	9/30/03	115,531	118,227	-2,696	9,943	9,943	0	47,706	49,289	-1,583	3,424	3,426	-2
21	Pitt	1/06/04	133,719	133,798	-79	6,333	6,333	0	58,365	58,408	-43	5,869	5,869	0
22	Randolph	6/17/03	130,471	130,454	17	1,345	1,345	0	54,428	54,422	6	3,763	3,763	0
23	Robeson	7/17/03	123,245	123,339	-94	3,330	3,330	0	47,749	47,779	-30	4,102		
24	Rutherford	10/10/03	62,901	62,899	2	1,532	1,532	0	29,536	29,535	1	4,344		
25	Union	10/10/03	123,772	123,677	95	1,666	1,666	0	45,723	45,695	28	2,304		
26	Wake	10/23/03	627,866	627,846	20	19,192	19,192	0	258,961	258,953	8	16,914		
27	Watauga	10/16/03	42,693	42,695	-2	5,392	5,392	0	23,156	23,155	1	6,615		

DEFENDANT'S EXHIBIT 5

http://demog.state.nc.us/demog/censcorr.html

28	Wilson	12/03/03	73,811	73,814	-3	1,865	1,865	0	30,728	30,729	-1	2,116	2,116	0
North Carolina Total			8,046,485	8,049,313	-2,828	253,881	253,881	0	3,522,330	3,523,944	-1,614	391,959	391,931	28

From the Census Bureau's Count Question Resolution Program

....go to top

(go to 2000 Census Home Page)

Last Update January 15, 2004

APPENDIX 3

April 26, 2001

CENSUS 2000 INFORMATION MEMORANDUM NO. 100

MEMORANDUM FOR Distribution List

From: Carol M. Van Horn
(Signed)

Chief, Decennial
Management Division

Subject: Count Question Resolution
Program

Census 2000 Count Question Resolution Program Overview

This memorandum provides information concerning the Census 2000 Count Question Resolution (CQR) program. This program will be implemented to respond to challenges to the Census 2000 housing unit and group quarter counts received from local and tribal governmental entities in the U.S. and Puerto Rico. The CQR program will become effective on June 30, 2001 and will end on September 30, 2003. Please note this program is currently pending Office of Management and Budget approval.

The CQR start date of June 30, 2001 is coordinated with the release of the Summary File 1(SF1). SF1 data will be released on a state-by-state basis between June and September 2001 and will contain block-level data on the number of housing units and

group quarters population counts. After the release of SF1, some governmental entities may want to challenge these counts. The Census Bureau will respond to all questions and will notify all affected governmental entities of any corrections to their official counts as a result of CQR.

Challenges to the overseas counts of persons in the military and Federal civilian personnel stationed overseas and their dependents living with them will not be accepted. These overseas counts are obtained using administrative records and will be used solely for reapportioning seats in the U.s. House of Representatives and do not provide the sub state geographic information required for the CQR program.

Governmental units challenging the completeness or accuracy of the Census 2000 counts must contact the Census Bureau directly in writing or by electronic mail to initiate the CQR process. All challenges should be sent to the Census Bureau's headquarters. Local and government officials can submit their challenge in writing to:

The U.S. Census Bureau
Count Questions Resolution Program
Decennial Management Division, Room 2002/SFC-2
4700 Silver Hill Road, Stop 7100
Washington, CD 20233-7100

CQR submissions also can be submitted to the following email address:

CountQuestion.Resolution@census.gov

The Census Bureau will respond to all submissions from local and tribal governments, county clerks, city planners, local planning board representatives, and state legislative representatives with redistricting functions within each state and state equivalents who are acting on the behalf of a local or tribal jurisdiction. A local or tribal government must provide documentation of the missing housing unit(s) or group quarter(s) that they believe existed on April 1, 2000. For documentation necessary to initiate the Census 2000 CQR process, refer to the section below, "Documentation Necessary to Initiate and Support the Census 2000 CQR Process."

The Census Bureau will make corrections if the results of our research indicate they are warranted. Our experience has shown that some of the questions received from the local or tribal officials do not reflect errors in census counts, but result from an incorrect or incomplete understanding of the procedures used to take the census. The Census Bureau's determination of whether a correction is necessary will be based on the information provided by local and tribal governmental unit representatives and the results of the Census Bureau's review of the census records. The Census Bureau will investigate challenges to determine whether a housing unit or group quarters that

existed on April 1, 2000, was allocated to an adjacent jurisdiction or erroneously excluded during the processing of the data. **The Census Bureau will not collect new information.**

The CQR program is not intended to create a mechanism or process to challenge the March 6, 2001 decision of the Secretary of Commerce to release unadjusted Census 2000 redistricting data. No changes will be made to the apportionment or redistricting counts as a result of this program. This process will allow the Census Bureau to maintain consistency between data products while maintaining the schedule for timely release of the data. However, the Census Bureau will issue a revised official Census 2000 population and housing unit counts for the affected governmental entity(es), maintain a list of CQR corrected areas on the American Factfinder, and will incorporate any corrections into its Postcensal Estimates program beginning in December 2002.

Types of Corrections Acceptable for the Census 2000 CQR Program

The results of the Census 2000 CQR Program will produce three types of corrections: boundary corrections; geocoding corrections; and coverage corrections:

Boundary corrections – Census 2000 respects the proper alignment of the jurisdictional boundaries of functioning

governmental units as legally in effect on January 1, 2000. The Census Bureau needs to ensure that the geographic assignment information provided does not, in fact, reflect boundary changes made after January 1, 2000. Problems, such as the inaccurate reporting of jurisdictional boundaries and the inaccurate recording of such boundaries by the Census Bureau, will be addressed by the CQR program. The boundaries of other geographic and statistical areas, such as census designated places, census tracts, voting districts, school districts, and the like are not in the scope of the Census 2000 CQR program.

Geocoding corrections – placement of living quarters and associated population within the correct boundaries, census blocks, and the like. Even if the CQR process does not result in a change to the total count for a local or tribal jurisdiction, we will send a letter to the local or tribal government official when the Census Bureau moves group quarters or housing units to different blocks within the jurisdiction.

Coverage corrections – add or remove specific living quarters and persons residing therein that were

identified during the Census 2000 process but erroneously included or excluded due to processing errors. Addresses for living quarters that were not found to be erroneously excluded due to processing will be added to the Census address list for use in future statistical programs of the Census Bureau.

Documentation Necessary to Initiate and Support the Census 2000 CQR Process

The Census Bureau will require documentation before committing resources to investigate concerns raised by local and tribal officials or their representatives about boundary and geographic assignment errors or the accuracy of the census housing unit or group quarters population counts. In general, when submitting a challenge, governmental entities must specify whether the challenge disputes the location of a governmental unit boundary or the number of housing units and/or group quarters population counts in one or more tabulation blocks.

Boundary challenges – For boundary disputes, indicate on a map the location of the governmental unit boundary in dispute; that is, it must be shown where the Census Bureau incorrectly depicts the boundary and show the correct

boundary legally in effect as of January 1, 2000. The Census Bureau will compare the maps and appropriate supporting documentation submitted by the challenging entity with the information used by the Census Bureau to depict the boundaries for Census 2000.

Challenges to boundaries must:

- show the correct location of the boundary and the portion of the boundary that the Census Bureau depicted incorrectly, including the Census 2000 tabulation block numbers associated with the boundary.
- Provide the Census Bureau with a list of addresses in affected tabulation blocks, indicating their location in relationship to the boundary requiring correction.

Housing Unit challenges – the governmental official must provide supporting evidence that specifically reflects the validity of any address list source and reflect the residential addresses that existed as viable living quarters on April 1, 2000.

Challenges to housing unit counts must:

- Specify the Census 2000 tabulation block(s) for which the counts are being challenged. SF1 can be used to obtain tabulation block housing unit counts.
- Provide a complete address list for all units that should be included in each contested block.
- Be certified by local and tribal officials that the addresses on their lists existed and could be lived in or April 1, 2000.

Group Quarters challenges – the government official must provide the name of the group quarters and evidence, e.g., a listing of patients that supports the number of persons residing in the XYZ Nursing Home as of April 1, 2000.

Challenges to group quarters population counts must:

- Specify the tabulation block(s) for which the counts are being challenged. Group quarters may have housing units on the premises for staff and/or guests. SF1 can be used to obtain group

quarters population counts by tabulation block.

- provide a complete address list for all group quarters units that should be included in each contested block.
- be certified by local and tribal officials that the addresses on their lists existed and could be lived in on April 1, 2000.

Types of Acceptable Paper Maps

Paper Census 2000 Public Law 94-171 County Block Maps – These maps accompanied the Redistricting Data Summary Files. Paper Census 2000 Redistricting Block Maps for Washington, D.C. Paper Census 2000 Redistricting Municipio block Maps for Puerto Rico – These maps will accompanied the Puerto Rico Redistricting Data File.

Paper Census 2000 Block Maps – These maps will be provided to local and tribal jurisdictions and will show tabulation block numbers. They are a companion map for the Demographic Profiles that will contain information on population totals, including group quarters and selected population and housing characteristics.

Paper Maps based on the 2000 TIGER/Line File – These maps may be generated by local or tribal governments based on information from the Census Bureau's 2000 TIGER/Line files using commercial geographic information systems.

Other Paper Maps Showing Census Bureau 2000 Tabulation Block Numbers and Boundaries – These maps should show geographic boundaries as of January 1, 2000, that identify census tabulation blocks, census tracts, legal and statistical entities and state boundaries; maps depicting data collection blocks cannot be used. In general, maps should be comparable to Census 2000 maps.

- **Types of Address Lists**

City-Style Address Lists – Must contain city-style addresses organized by Census 2000 tabulation block within census tract. Housing unit identifiers in multi-unit buildings must be included, if applicable.

Non-City-Style Address Lists – Non-city-style addresses must be keyed to the local or tribal government's map-spotted maps, that is, maps that show the exact location of the housing unit. The list should be focused on the specific

area and/or addresses where the problem exists. All housing units in the disputed block must be map spotted and a description of the housing unit and location must be supplied.

Group Quarters Information—Provide the name, address, and telephone number for the administrative office of the facility as of April 1, 2000. In addition, provide the census tract and tabulation block number for the location of the group quarters.

Internal Census Bureau Review

Changes to the boundaries or counts for a jurisdiction also may result from Census Bureau initiated research and review of census files. The Census Bureau reviews Census 2000 data by checking for data reasonableness, internal and intra-product consistency, and consistency with historical and external data sources. This review process begins with an analysis by Census Bureau staff, the Federal-State Cooperative Program for Population Estimates and others. These reviewers identify, address and/or explain issues or problems related to coverage, content, processing, and geo-coding. Unresolved potential problems will be forwarded to the CQR staff for additional analysis.

Changes made as result of this internal review and/or research will be incorporated into the CQR processes and documented in the same way that changes based on

jurisdictional CQR challenges will be documented. In cases where changes to housing unit and/or population counts are made, new official counts will be issued to the affected jurisdictions.

Changes That Result in Corrections

The corrected CQR counts that are issued are based on the housing unit and population counts as of April 1, 2000. The new official census counts may b used by the governmental entities for all programs requiring official Census 2000 data. The Census Bureau will not make corrections to the data concerning the characteristics for the population and housing inventory. The corrected counts will be reflected in the Census Bureau's decennial filed modified for use in making postcensal estimates that will be released on a flow basis beginning in December 23002. An inventory of corrections also will be available on the American FactFinder Internet Data Access System (errata) and updated periodically. The base files for the census will remain unrevised so that none of the standard Census 2000 data products will reflect the corrections.

Challenges that Do Not Result in Corrections

When a local or tribal government provides evidence that the Census Bureau missed housing units or group quarters that existed on April 1, 2000, but the CQR research and Census 2000 records show that all of the Census Bureau's boundary information, geocoding, and processing were correctly implemented, the Census Bureau will respond by sending a letter to the official or his/her representative stating that the Census Bureau will maintain the documentation for

consideration in the context of address list updating activities over the decade.